Supreme Court of the United States

OCTOBER TERM, 1968

No. 643

MARTIN RENE FRAZIER,

Petitioner,

—v.—

H. C. CUPP, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 67-101

MARTIN RENE FRAZIER, PETITIONER

vs.

CLARENCE T. GLADDEN, Warden,
Oregon State Penitentiary, RESPONDENT

PRE-TRIAL STIPULATION AND ORDER

Pre-Trial Conference was held in the above cause on the 20th day of April, 1967, David H. Blunt, Assistant Attorney General, appeared for the State, and the petitioner and his appointed attorney, Richard D. Barber, were present. The form of the Pre-Trial Stipulation and Order were agreed upon and the hearing proceeded.

AGREED FACTS

1. This is a proceeding under 28 U.S.C. § 2241-§ 2254 to vacate and set aside the Judgment and Sentence in a criminal proceeding in the State of Oregon. It is a civil action and the petitioner has the burden of proof to sustain, by a preponderance of the evidence, his claim for relief on the issues herein set forth.

2. Heretofore, the Court has ruled that *all issues* that might affect the validity of the criminal judgment and sentence should be presented at this hearing; that the petitioner will have the burden of proof on all of said issues; and that in the absence of proof on a particular issue, the Court will find that petitioner has not sustained his burden of proof and will find against the petitioner on the merits of such issues; all other issues will be decided by the Court on the basis of the preponderance of the evidence.

3. The declared purpose of this Pre-Trial Stipulation and Order is to prevent piecemeal and repetitious petitions for relief, to hear and consider all matters that

might affect the validity of the criminal judgment and sentence, and, insofar as possible, determine all such issues in one hearing.

4. It is agreed that petitioner is in the custody of the respondent, pursuant to a conviction following a plea of not guilty and a verdict of guilty and sentence by the Circuit Court of the State of Oregon for the County of Clackamas on a criminal indictment in Case No. 60935, which indictment charged:

> Murder in the first degree, verdict of guilty of murder in the second degree, and sentenced to twenty-five years in the Oregon State Penitentiary.

5. Petitioner sought the appointment of counsel in this action. On March 1, 1967, the Court appointed Richard D. Barber, a member of the Bar of this Court to represent petitioner; and that said attorney has conferred with the petitioner, prepared his case, participated in the Pre-Trial and his services have been entirely satisfactory to petitioner.

6. Copies of the transcripts of all prior proceedings under review in this cause are attached hereto and by this reference made a part hereof. Said copies are listed and identified in the list of exhibits which is made a part hereof.

7. The petitioner has exhausted the remedies available to him in the Courts of the State of Oregon.

PETITIONER'S CONTENTIONS

1. The trial court's refusal to suppress as evidence certain items of petitioner's clothing and permitting the admission of same as evidence, which clothing was seized from petitioner's duffel bag, after his arrest and without a search warrant, violated the petitioner's rights under the 4th Amendment to the United States Constitution to be secure in his person, house, papers and effects, against unreasonable search and seizure.

2. Permitting the District Attorney, in his opening statement, to refer to and read from the written confession of a co-indictee, after having received notice from counsel for the co-indictee and for the petitioner, and that

the co-indictee would not testify if called as a witness, and the failure of the Court to instruct the jury to disregard that portion of said opening statement violated petitioner's right to due process.

3. The admission into evidence of petitioner's written confession which was obtained after interrogation prior to which petitioner was not effectively advised of his right to counsel and to remain silent, violated petitioner's constitutional rights.

4. The petitioner denies the respondent's contentions.

RESPONDENT'S CONTENTIONS

1. The petitioner was effectively advised of his rights to an attorney prior to the taking of his written statement.

2. The petitioner testified as a witness in his own behalf and thereby waived any objections to the introduction of his statement into evidence.

3. Respondent denies the contentions of the petitioner.

ISSUES OF FACT

1. Did the District Attorney actually read from the written statement of petitioner's co-indictee in his opening statement?

2. Did the District Attorney have sufficient notice that petitioner's co-indictee would not testify if called as a witness?

3. Was the petitioner given effective advice regarding his right to counsel and to remain silent, before interrogation leading up to his written statement?

ISSUES OF LAW

1. Is an accused, after arrest, secure in relying upon his duffel bag not being seized and searched without a search warrant, when the bag is in the home of a third party who consents to a general searching of the house?

2. Is a deliberate reference to inadmissible or questionable evidence in an opening statement so prejudicial to petitioner so as to deny him due process of law?

3. Is a written confession admissible into evidence when the interrogation leading thereto was not preceded by effective advice regarding rights to counsel and to remain silent?

4. Does a criminal defendant waive his objections to the admissibility of a written statement into evidence by taking the witness stand and testifying in his own behalf?

PLEADINGS

This Pre-Trial Order supersedes all pleadings in this cause and shall govern and control the subsequent course of action of this trial, unless modified to prevent manifest injustice.

EXHIBITS

The following exhibits were produced and marked, and may be received in evidence, if otherwise admissible, without further authentication. Except as may be hereinafter noted, each is what it purports to be:

PETITIONER'S EXHIBITS

1. Transcript of Proceedings of January 18, 1965, on Motion to Suppress. (one volume)
2. Transcript of Proceedings, January 26, 1965, to February 3, 1965, trial. (six volumes)
3. Appellant's Abstract of Record and Brief, Oregon Supreme Court.
4. Respondent's Brief, Oregon Supreme Court.
5. Appellant Reply Brief, Oregon Supreme Court.
6. Appellant's Petition for Re-Hearing and Supporting Brief, Oregon Supreme Court.
7. Opinion, Oregon Supreme Court, 83 Adv. Sh. 217, 418 P2d 841.

IT IS SO ORDERED.

DATED: April 8, 1967

/s/ GUS J. SOLOMON
United States District Judge

[Subscriptions omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 67-101

MARTIN RENE FRAZIER, PETITIONER

vs.

CLARENCE T. GLADDEN, Warden,
Oregon State Penitentiary, RESPONDENT

Richard D. Barber,
687 Court Street, N. E.,
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Attorney for Petitioner.

Robert Y. Thornton,
Attorney General of Oregon,
David H. Blunt,
Assistant Attorney General,
Supreme Court Building,
Salem, Oregon 97310,
Attorneys for Respondent.

OPINION—August 21, 1967

SOLOMON, Judge:

Martin Rene Frazier, a prisoner in the Oregon State Penitentiary, seeks a writ of habeas corpus under 28 U.S.C. §§ 2241-2254. The petitioner was convicted of second degree murder in the Clackamas County Circuit Court on February 4, 1965, for strangling Russell Anton Marleau to death. The petitioner received a sentence of 25 years.

At the time of the crime, the petitioner was a 20-year old Marine home on leave for his mother's funeral. He stayed at his aunt's house in Portland where he shared a bedroom with his counsin, Jerry Lee Rawls.

The petitioner was picked up by Clackamas County Deputy Sheriffs at his aunt's home on September 24, 1964, at 4:15 P.M. No warrant was issued for his arrest nor

was he arrested. The petitioner was not informed of his Constitutional rights to counsel and to remain silent. The deputies took the petitioner to their office in Oregon City. They arrived at 4:50 P.M. and immediately began to interrogate the petitioner.

The petitioner made damaging admissions about the Marine uniform he wore during the period in which the crime was committed. After the petitioner made these initial incriminatory statements, the deputies informed him that he could have a lawyer, if he so desired, and that anything he said could be used against him. The petitioner did not request a lawyer at that time. The deputies continued to question him. The petitioner confessed and implicated his cousin, Jerry Lee Rawls. He then told the deputies that it might be better if he did not say any more until he obtained the advice of a lawyer. The deputies informed him that he was already in serious trouble and continued to question him. The deputies asked the petitioner to sign a written confession. They told him that he was not required to sign it, but if he did not, they would testify about the oral confession he had just made. They also told him that after he signed the confession, he would be arraigned and the Court would appoint a lawyer for him. The petitioner signed the confession. At 7:00 P.M. he was arrested, and at 9:30 P.M. he was arraigned. At the arraignment a lawyer was appointed for him.

Later that evening Rawls was arrested in front of his mother's home. Rawls and his mother, the petitioner's aunt, permitted the deputies to search the petitioner's duffel bag in the bedroom although the deputies had no search warrant. The deputies found bloodstained clothes belonging to both Rawls and the petitioner. Rawls subsequently signed a confession, stating that the petitioner strangled Marleau.

Rawls entered a plea of guilty to second degree murder, but the petitioner stood trial. The petitioner moved to suppress his own confession on the ground that he was not informed of his right to counsel and his right to remain silent. A hearing was held outside the presence of

the jury to determine the admissibility of the confession. The Court ruled that it was admissible.

The District Attorney in his opening statement paraphrased from Jerry Lee Rawls' written confession which he held in his hand. The confession stated that the petitioner strangled Marleau. The petitioner immediately demanded a mistrial on the ground that he would be denied the opportunity to cross-examine Rawls who the District Attorney knew would take the Fifth Amendment if called to testify.

The Court held a hearing outside the presence of the jury. The petitioner's attorney stated that Rawls would not testify, that he had given this information to the District Attorney, and that the petitioner would be denied a fair trial if the confession was not admitted because the confession was already before the jury. The District Attorney stated that one of his Deputies as well as other persons had informed him that Rawls would testify. The Court denied the motion for a mistrial. The Court ruled that if Rawls' confession was not received, the jury would be instructed to disregard the prejudicial portion of the District Attorney's opening statement.

Later, the District Attorney called Rawls as a witness, but Rawls refused to testify. The petitioner renewed his motion for a mistrial, but it was again denied. Although the confession was not admitted, the Court failed to instruct the jury to disregard the District Attorney's statements about the confession. The jury convicted the petitioner.

The petitioner appealed his conviction to the Supreme Court of Oregon, setting forth the following specifications of error:

1. The trial court failed to grant a mistrial when the District Attorney read long excerpts from an alleged confession made by a co-indictee when the District Attorney knew that the confession would not be admitted in evidence because the co-indictee would probably refuse to testify.

2. The trial court admitted in evidence the petitioner's written confession made involuntarily and

without being effectively advised of his right to counsel, his right to remain silent, and without being warned that anything he said could be used against him.

3. The trial court admitted in evidence the contents of the petitioner's duffel bag which the authorities seized in violation of his right to be free from an unreasonable search and seizure.

The Supreme Court of Oregon rejected each contention and affirmed the conviction. 83 Or. Adv. Sh. 217, 418 P.2d 841 (1966).

The trial court erred in refusing to grant a mistrial. The petitioner was denied the right to confront and to cross-examine Rawls because Rawls took the Fifth Amendment. *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965). In *Douglas*, the solicitor was able to get the confession of the defendant's alleged accomplice before the jury under the guise of questioning a hostile witness although the witness refused to answer the solicitor's questions on Fifth Amendment grounds. The Supreme Court held that the defendant's inability to cross-examine the witness violated the Sixth Amendment.

The purpose of an opening statement is to set forth in broad outline what the prosecution expects to prove. It is poor practice for the District Attorney to set forth in great detail the testimony he expects from each witness. It is error for him to read from or to appear to read from the confession of a co-indictee which incriminates the defendant when the document has not been admitted in evidence and cannot be admitted as substantive evidence. The error is compounded when the District Attorney knows that the co-indictee may refuse to testify. Even if the trial court had instructed the jury to disregard Rawls' confession, which it did not, the petitioner would have been entitled to a mistrial.

The trial court also erred in refusing to suppress the petitioner's own confession. The petitioner was not advised when he was taken into custody that anything he said could be used against him, nor was he informed that

he had a right to remain silent and that he had a right to a lawyer. *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

The State, relying on the *Unsworth* doctrine, 240 Or. 453 (1965), cf. *State* v. *Dotson*, 239 Or. 140 (1964), and *State* v. *Freeman*, 232 Or. 267 (1962), contends that the error was cured because the petitioner took the stand in his own behalf while represented by counsel and testified substantially in accordance with his confession. There is no merit to this contention. I considered the *Unsworth* doctrine in *Unsworth* v. *Gladden, Warden, Oregon State Penitentiary*, D.Or. 1966, 261 F. Supp. 897, and rejected it. I granted Unsworth a new trial. I pointed out that if Unsworth had been given a hearing outside the presence of the jury, the State may have been unable to make out a prima facie case; the case against Unsworth would have been dismissed; and Unsworth would not have had to testify.

I need not decide whether the search and seizure of the petitioner's duffel bag and its contents violated his Fourth Amendment rights because sufficient reason already exists to grant a new trial.

Petitioner's application for a writ of habeas corpus is granted, and the State of Oregon is ordered to release him from custody within 20 days unless prior to that date the State of Oregon grants petitioner a new trial or unless the defendant Gladden obtains a stay pending appeal from the United States Court of Appeals.

This opinion shall constitute findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure.

Dated this 21st day of August, 1967.

/s/ Gus J. Solomon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 67-101

MARTIN RENE FRAZIER, PETITIONER

vs.

CLARENCE T. GLADDEN, Warden,
Oregon State Penitentiary, RESPONDENT

ORDER

Based upon the opinion of this Court entered this day, and for the reasons therein stated,

IT IS ORDERED that respondent, Clarence T. Gladden, Warden, Oregon State Penitentiary, release the petitioner from custody on or before 20 days from the date of this order, unless prior to that date the State of Oregon grants petitioner a new trial or unless the defendant obtains a stay pending appeal from the United States Court of Appeals.

Dated this 21st day of August, 1967.

/s/ Gus J. Solomon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Title omitted in printing]

NOTICE OF APPEAL

TO: MARTIN RENE FRAZIER, at 2605 State Street, Salem, Oregon, and RICHARD D. BARBER, 687 Court Street NE, Salem, Oregon, his attorney:

Notice is hereby given that Clarence T. Gladden, Warden of the Oregon State Penitentiary, the defendant above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order entered the 21st day of August, 1967, ordering the petitioner herein for a Writ of Habeas Corpus, Martin Rene Frazier, be discharged from the custody of the defendant, Warden of the Oregon State Penitentiary, on or before the 11th day of September, 1967.

Further notice is given that simultaneously with the filing of this Notice of Appeal, a check in the amount of $250 has been delivered to the Clerk of the United States District Court for the District of Oregon, as payment in cash in lieu of the bond for costs on appeal provided for under Rule 73(c) of the Federal Rules of Civil Procedure.

ROBERT Y. THORNTON
Attorney General of Oregon

/s/ David H. Blunt
DAVID H. BLUNT
Assistant Attorney General
Attorneys for Respondent

[Certificate of Service omitted in printing]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,140

CLARENCE T. GLADDEN, Warden, APPELLANT

vs.

MARTIN RENE FRAZIER, APPELLEE

On Appeal from the United States District Court for the Northern District of California [sic][1]

OPINION—January 4, 1968

Before: MADDEN, Judge of the United States Court of Claims, and MERRILL and DUNIWAY, Circuit Judges.

MADDEN, Judge:

The appellee Frazier was convicted in 1965 of second degree murder in the Circuit Court of the State of Oregon. He was sentenced to imprisonment in the Oregon State Penitentiary for a term not to exceed twenty-five years. He appealed his conviction to the Supreme Court of Oregon, which court affirmed his conviction. State v. Frazier, ... Or. ....., 418 P.2d 841 (1966). He then petitioned the United States District Court for the District of Oregon, pursuant to the provisions of §§ 2241-2254 of Title 28, United States Code, for a writ of habeas corpus. In that court his petition was superseded by a Pre-Trial Stipulation and Order. The district court found that in Frazier's Oregon murder trial his constitutional rights had been violated in several specified regards. The court therefore granted the petition and ordered the warden to release Frazier from custody within 20 days unless the State of Oregon granted Frazier a new trial on the murder charge, or unless the warden obtained from this court of appeals a stay of the operation of the district court's order pending the warden's appeal to this court,

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[1] Correctly "On Appeal from the United States District Court for the District of Oregon."

if he did so appeal. The warden has appealed, asserting that the district court committed error in granting Frazier's petition for habeas corpus, and the merits of his appeal are now before this court for decision. We consider the several occurrences in the trial, which occurrences the district court held to have involved violations of Frazier's constitutional rights.

Frazier and Rawls, a cousin of Frazier, were jointly indicted by the Oregon authorities for the murder of one Marleau. Rawls made a confession to the Oregon authorities, first orally and then in a writing signed by him, which confession deeply implicated Frazier in the killing. Rawls later pleaded guilty to second degree murder and, when Frazier's trial took place, had not yet been sentenced on his plea of guilty.

In Frazier's trial, the Oregon prosecutor, in his opening statement to the jury, stated in considerable detail the evidence which he intended to present, naming the witness or witnesses who would testify to the several items of evidence. He stated that he expected Rawls to testify to the commission of the crime, and recited what Rawls' testimony would be. He did not say that Rawls had confessed. When the prosecutor had completed his opening statement, Frazier's defesne counsel moved for a mistrial. The court denied the motion. The prosecutor had subpoenaed Rawls, and called him to the witness stand. When questioned, Rawls claimed the privilege against self-incrimination and refused to answer the prosecutor's questions. The trial judge sustained Rawls' claim of privilege, and Rawls left the witness stand. Frazier's defense counsel again moved for a mistrial, and the motion was again denied. The prosecuting attorney, in the course of a lengthy trial, made no other reference to any statement made by Rawls.

The events above recited constituted one of the grounds on which the district court based his grant of Frazier's application for the writ of habeas corpus. The court held that the prosecutor's recital, in his opening statement, of what testimony he expected from Rawls, while the prosecutor held in his hand several papers, one of which was Rawls' signed confession, and read several times from that paper, was, in effect, the introduction before the

jury of Rawls' statement, as to which Frazier's counsel had no opportunity to cross-examine Rawls.

In any case in which counsel for a litigant elects to make an opening statement outlining to the jury the substance of what he expects to prove, and naming the witnesses by which he hopes to prove it, rather than leaving it to the jury to pick up the thread of the continued story from the succession of incidents, each incident testified to by a separate witness, there is the possibility that the testimony which counsel has spoken of will never materialize on the witness stand. The expected witness may die or disappear or may effectively claim a privilege not to testify, or some person who has the right to prevent the witness from testifying may assert that right. If it happens that counsel does not get the expected testimony, he has to do the best he can without it. If he can prove his case without it, he may still win. But a rule that a mistrial must be declared because the expected testimony outlined in the opening statement is never given from the witness stand, and consequently the adversary never has a chance to test its truth by cross-examination, would be a wasteful and mischievous rule. The controlling question should be the good faith or lack of good faith of counsel in saying what he said in his opening statement and the likelihood that the opening statement was unfairly prejudicial to the defendant. Douglas v. Alabama, 380 U.S. 415; Namet v. United States, 373 U.S. 179, 180-190.

In the instant case, at the beginning of the trial and before the jury was selected, Frazier's lawyer, in the presence of the prosecutor, said he had information that Rawls, if called as a witness, would claim his privilege against self-incrimination. He did not say what the source of his information was. Some days before Frazier's trial, the prosecutor had telephoned to Rawls' lawyer, Mr. Jacobs, to get permission to talk to Rawls. Permission was not immediately given, Jacobs saying that he himself had not talked to Rawls yet. The next day the prosecutor's assistant, Thomas, picked up Jacobs and transported him to the jail, where Jacobs talked to Rawls, then told Thomas that Rawls was going to refuse to testify, and gave permission to Thomas to talk to Rawls,

saying, "All right, you talk to him. This is what he tells me. This is his own decision." Between that time and the trial, a deputy sheriff had talked to Rawls and had reported to the prosecutor that he felt sure that Rawls would testify and that Rawls' brothers, who had conversed with Rawls, had told the deputy that he wanted to testify and they thought he would testify, in spite of the advice of his lawyer. Rawls' probation officer told the prosecutor that he thought Rawls would testify.

In addition to the foregoing reasons for the prosecutor to believe that Rawls would, if called to the stand, testify, there was of course the fact that Rawls had pleaded guilty and was awaiting sentence, and would feel under strong compulsion not to refuse to cooperate with the prosecutor.

The Oregon trial judge, who was in the best position to determine whether the prosecutor had acted in good faith in calling Rawls to the witness stand, and whether this incident, when coupled with the opening statement, was prejudicial to the defendant, held that the prosecutor had acted in good faith and denied a motion for mistrial. We have before us the same cold record which the United States District Court had before it in this habeas corpus case, and we are in as good a position as was the district court to determine whether the Oregon court's implied findings were supported by the evidence. The district court's position in the habeas corpus case may well have been that good faith and prejudice were not the issues, but that counsel acts subject to the risk that the expected testimony which he recites in his opening statement, if it does not materialize, will require a mistrial. If that was the view of the district court, it was erroneous.

The fact that Rawls' expected testimony, once it became unavailable, was never again mentioned in the extended trial is of some significance on the question of the prosecutor's good faith, and of great significance on the question of the prejudicial effect of the opening statement and the calling of Rawls to the stand.

The Oregon trial judge said, in denying Frazier's second motion for a mistrial, that he would instruct the jury not to give any weight to what the prosecutor had said

in his opening statement about Rawls' expected testimony. He did not give a specific instruction on that point. He either forgot his earlier statement or, more probably, thought better of it. Such an instruction, if given, would have recalled the incident to the minds of the jurors. Counsel for Frazier apparently for the same reason did not desire such an instruction or he would have reminded the court of its earlier statement. The court did give a general instruction that statements of counsel are not evidence.

Counsel for Frazier rely heavily upon the Supreme Court's decision in Douglas v. Alabama, supra. In Douglas, after the witness had claimed the privilege against self-incrimination, the prosecutor read the confession to him, a few sentences at a time, asking the witness after the reading of each few sentences, "Did you make that statement?" Each time the witness refused to answer, claiming the privilege. Thus the prosecutor, knowing that he was not going to get any testimony from the witness, deliberately placed every word of the inadmissible hearsay before the jury, compelling the witness to repeatedly claim his right to keep silent, and thus impressing the jury with the probable truth of the statement. The prosecutor could not possibly claim that he acted in a good faith expectation that the witness would testify. Douglas was a flagrant case of purposely and in bad faith placing before the jury in the most impressive possible manner inadmissible evidence the truth of which could not be tested by cross-examination. The "evidence" thus offered was the only evidence relating to a crucial element of the prosecution's case. Counsel for Frazier does not cite any case in which an appellate court has reversed a judgment for the reason relied upon by the district court in this phase of the instant case.

In the case before us, there is no problem of lack of opportunity to confront a witness who had given testimony, either directly or, as in Douglas v. Alabama, supra, indirectly by having his extra-judicial statements read to him and to the jury while he refused to confirm or deny his having made the statements attributed to him. Rawls was on the witness stand only momentarily, and neither

by question nor answer was anything which was contained in his confession brought to the attention of the jury. Our problem, then, is whether the references to Rawls in the opening statement, followed by the calling of Rawls to the witness stand, was prosecutorial misconduct. We hold that it was not. We have shown above that it was done in a good faith expectation that Rawls would testify. Namet v. United States, supra; Leonard v. United States (CA 9, 1960) 277 F.2d 834, 841; State v. Broadhurst, 184 Or. 178, 219-27 (1948).

The district court was in error in finding a violation of a constitutional right of Frazier in the events relating to the prosecutor's opening statement.

The second ground relied upon by the district court in granting Frazier's petition for a writ of habeas corpus was the admission in evidence, in Frazier's Oregon trial, of a written statement, signed by him, which recited his actions in relation to the crime, which statement seriously incriminated him. The district court concluded that the taking of the statement from Frazier was a violation of his constitutional rights and that the statement was, therefore, inadmissible in evidence, and its admission was a ground for granting his petition for a writ of habeas corpus.

The federal constitutional requirements applicable to this case, in regard to the warnings which must be given by the police to one accused of crime in order to make valid and usable against him information obtained from him by police questioning, are the requirements prescribed by the Supreme Court in Escobedo v. Illinois, 378 U.S. 478 (1964). The stricter requirements of Miranda v. Arizona, 384 U.S. 436 (1966), were not applicable to this case, in which the Oregon trial began in 1965. Johnson v. New Jersey, 384 U.S. 719 (1966).

When Frazier was taken into custody and questioned by the police, he admitted going out with Rawls on the night of the homicide; claimed that he and Rawls were alone; talked vaguely about getting shoe polish on his clothing. At that point he was advised that he had a right to an attorney and that any statement that he made could be used against him at a trial. When questioned more pointedly, he admitted that he and Rawls were with

the man, Marleau, who had been killed on the night in question. He indicated that both he and Rawls "did it"; claimed Marleau made homosexual advances and was driving wildly. He said, "I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now." A detective said, "You can't be in any more trouble than you are in now." The questioning continued. Frazier made no further mention of a lawyer. He made a complete statement admitting that he hit Marleau about the head at least twice with a rock, but denying that he strangled him. His statement was typed, he was asked to sign it, and was told that if he did not have money to hire a lawyer one would be appointed for him. He was questioned further, was advised to read the statement carefully, which he did for some ten minutes, and then signed it. The statement said that the signer had not been threatened or coerced; had not been promised any reward or immunity; knew that he was not required to make any statement, and that any statement which he made could be used against him in criminal proceedings. The statement concluded with language certifying that the signer had been advised of his constitutional right and had waived his right to have counsel present while he was questioned.

The trial court heard, in chambers, the tape recording of the questioning of Frazier. It held that the oral and written statements of Frazier had been made voluntarily, and admitted the written statement in evidence over the objection of counsel for Frazier. The statement was read to the jury.

There was nothing about Frazier's statement which would have made it constitutionally objectionable under the doctrines which prevailed before the Supreme Court's decision of 1964 in Escobedo v. Illinois, supra. There was no physical or mental coercion, no prolonged interrogation, with or without relays of interrogators, no deprivation of rest or food, no deficiency in age or intelligence or experience. If, then, this 1965 statement was vulnerable on constitutional grounds, it was because its taking by the police did not comply with the new requirements of Escobedo, supra, decided in 1964. The new doctrine

added by Escobedo was that when the suspect was in police custody, even before indictment but after the investigation had begun to focus upon the suspect, and the police were carrying out a process of interrogation that lent itself to eliciting incriminating information, the suspect had requested and been denied an opportunity to consult with *his* lawyer, the police had not effectively warned him of his absolute constitutional right to remain silent, and the accused had been denied "the assistance of counsel," no statement elicited by the police during the interrogation could be used against him in a criminal trial.

Escobedo was not a broad, expansive, doctrinal decision. It was a venture into new legal territory, and the stress in the Court's statement was upon its extension of the right of assistance of counsel, which only in the preceding year had been, in Gideon v. Wainwright, 372 U.S. 375 (1963), held binding upon the states in trials, to proceedings at the police station under a certain defined combination of circumstances. In the Court's opinion in Escobedo, the paragraph beginning, "We hold," 378 U.S. at pp. 490-491, recites, in a single long sentence which we have paraphrased above, the several circumstances which are required to exist in combination to bring into effect the new exclusionary rules.

Early in the interrogation, and before Frazier had made any statement of significance, he was advised that he had a right to an attorney and that any statement which he made could be used against him in a trial. He did not, as Escobedo did, request an opportunity to consult with any lawyer. He said, at a later point in the interrogation we have recited above, "I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now." At the time involved in this case, there was no constitutional obligation on the part of a state to advise a suspect that he had a right to consult a lawyer during a police investigation, and there was no obligation to supply him with a lawyer. The interrogators had no duty, then, to follow up the suspect's statement that he thought he had better get a lawyer, by asking him to elaborate it. He had made the statement, and

knew whether he wanted to pursue it or not. He did not pursue it, but continued to make his statement.

We conclude that, under the teachings of the Supreme Court applicable in the two-year interval between Escobedo and Miranda, the statement which Frazier made was admissible in evidence. Escobedo is specific as to what it decides, and Johnson v. New Jersey, supra, is specific as to the date upon which the stricter teachings of Miranda became applicable. It is not for this court, or for any federal court inferior to the Supreme Court of the United States, to expand the Supreme Court's carefully defined ruling in Escobedo. The district court's conclusion that Frazier's statement had been unconstitutionally obtained was erroneous.

Counsel in their briefs have devoted considerable attention to the question whether Frazier, by taking the witness stand in his own defense and testifying in substantial accord with what he had said in his signed statement, which had been admitted in evidence over his objection, waived the objection. Since we have concluded that the objection was without merit, it is unnecessary to decide and we do not decide whether there would have been a waiver if the objection had been valid.

In the pre-trial stipulation upon which the case was heard in the district court, under the heading "Issues of Law," issue No. 1 of the four stated issues was as follows:

> Was the search and seizure of petitioner's duffel bag in violation of the constitutional prohibition against unreasonable searches and seizures?

The district court, having decided, as we have seen, that each of two other grounds was sufficient to support the grant of the writ, did not discuss or decide the issue of law just above stated. Since we are holding that the district court was in error in its decision as to each of the two grounds referred to, it is necessary for us to advert to issue No. 1 which the district court did not resolve. The search of the bag was the subject of the first assignment of error in Frazier's appeal of his conviction to the Supreme Court of Oregon. As we have seen, that court sustained the conviction. State v. Frazier, ... Or. .....,

418 P.2d 841 (1966). The pertinent facts regarding the search in question are recited in the opinion of the Supreme Court of Oregon. After the police had taken Frazier into custody they arrested Jerry Rawls. They had no search warrant. They asked Rawls if they could have his clothing. He said yes. Asked where his clothes were, he said they were in a blue bag in his bedroom. He shared the room with Frazier, who was there for a few days on leave from the Marine Corps. The bag was opened and in it were found clothing of both Rawls and Frazier and other things belonging to Frazier. The clothing had stains on it which appeared to be blood stains. The Oregon court said that Frazier did not contend that the search of the house and the room was unreasonable, but contended that the search of the bag and the seizure of its contents violated the Fourth Amendment. The court said that Rawls had authority to consent to the opening of the bag which contained his clothing; that having opened the bag and found bloody clothing, the police, who were investigating a murder case, properly seized it. They did not know that the bag did not belong to Rawls until they opened it and found Frazier's clothing in it. The court held that the search was lawful because of what became visible to the police when they searched.

The Oregon court's disposition of the search and seizure question was, we think, correct, and we rest our decision on that question upon the same ground. As an additional and alternative ground, we feel certain, beyond a reasonable doubt, that the fact of the search and the bloody clothing which it discovered had no effect upon the outcome of the case. Frazier took the witness stand and testified fully as to the affray in which he participated and as to the blood which was on his clothes after the affray. The bloodstained clothes could have added nothing to his own testimony. The rule as to harmless error laid down by the Supreme Court in Chapman v. California, 386 U.S. 18 (1967), though it is strict, is fully satisfied by the facts of this case.

The judgment of the district court is reversed, and the court is directed to dismiss the petition for a writ of habeas corpus.

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,140

CLARENCE T. GLADDEN, Warden, APPELLANT

vs.

MARTIN RENE FRAZIER, APPELLEE

JUDGMENT

APPEAL from the United States District Court for the Northern District of California [sic][2]

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California [sic][2] and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, and the court is directed to dismiss the petition for a writ of habeas corpus.

Filed and entered January 24, 1968

[2] Correctly "United States District Court for the District of Oregon."

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted in printing]

Before: MADDEN, Judge of the United States Court of Claims, and MERRILL and DUNIWAY, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—
April 15, 1968

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellee filed March 22, 1968, and within time allowed therefor by rule of Court, and valid extension thereof, for a rehearing of above cause be, and hereby is denied.

EXHIBIT 1

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

No. 60935

STATE OF OREGON, PLAINTIFF

vs

MARTIN RENE FRAZIER, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

[Hearing on Motion to Suppress]
January 18, 1965

* * * *

[Direct Examination of Officer Brooks]

[fol. 17] Q [By Mr. Goodwin, attorney for Frazier] All right, now, after he [Rawls] was arrested, did he disclose to you that there was a blue duffel bag or flight bag in the bedroom of that home that belonged to Martin Frazier?

A [Officer Brooks] Not in that way.

Q What did he disclose to you with regard to a blue duffel bag?

A He said that there was a blue duffel bag in the back bedroom of his house. He didn't say who it belonged to.

Q Did anybody say who it belonged to before it was taken?

A No.

* * * *

[fol. 19] Q So what you wanted the bag for was the evidence that might be in the bag in the way of clothing worn by the defendants or either of them at the time of the crime?

A Yes.

Q And it was your understanding from talking to Rawls that you would find that type of evidence in the bag. Is that correct?

A Yes, his clothing.

* * * * *

[fol. 20] Q So then, tell us what you did after you discussed this bag with this defendant, Rawls, co-defendant Rawls, or his brothers?

A I asked Jerry Rawls [co-indictee] if we could have his clothing and he said "yes." I asked him where it was and he said it was in a blue bag in his bedroom. Ronald Rawls [brother of Jerry Rawls] volunteered to get the bag and I said "No perhaps I should go with you." So we did go into the house and introduced ourselves to Mr. and Mrs. Robertson [parents of Jerry Rawls]. There was Ronald Rawls Detective Jackson and myself.

* * * * *

Q So you went in and got the bag?

A We entered and introduced ourselves and explained our purpose for being there and asked them if we might have the bag which they said "Yes." Ronald and Detective Jackson went to the bedroom, brought the bag out. There I opened the bag. It has a zipper pocket on both sides. I opened one side, looked in it and saw some clothing in there which I believed to be that of Jerry Rawls. I told Mr. and Mrs. Robertson that I believed I had what we were looking for and may I have the bag and the contents, and she said, "Yes." I zipped up the bag and we left the house.

[fol. 21] Q Now, did you ever apply to Judge Frazier of the District Court, or any other magistrate for any authority to inspect the contents of the bag?

A No.

EXHIBIT 2

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

[Caption omitted]

REPORT OF PROCEEDINGS

[Trial]

January 26—February 3, 1965

* * * *

[Pre-trial Colloquy]

[fol. 2] THE COURT: This is in the matter of the trial of State of Oregon, plaintiff, versus Martin Rene Frazier, defendant. The record should show that before taking the bench and starting that we are in chambers and have certain preliminary matters to discuss with the Court.

* * * *

[fol. 5] MR. GOODWIN: I might tell the Court, if your Honor please, that this morning I was advised by the Court appointed counsel for Jerry Lee Rawls, who has pled guilty but has not been sentenced in connection with this crime, that he received a subpoena to appear as a witness in this case, and it is the desire of Mr. Rawls that he not be required to appear in this case, and that if he is required to appear that he will take the Fifth Amendment inasmuch as it is his feeling that while [fol. 6] he awaits sentence if he is required to disclose his entire participation in this crime, and all the facts in connection with the crime, that it might jeopardize his position with the sentencing judge.

THE COURT: I don't think, Mr. Goodwin, since you do not represent Mr. Rawls, that this is a proper matter for you to bring up at this time.

MR. GOODWIN: The only reason I am mentioning it, I want the District Attorney and the record to show this

position so that the District Attorney will be careful not to make any reliance upon statements to the jury about what Mr. Rawls might testify to when I understand the District Attorney has been advised also that Mr. Rawls intends to claim the Fifth Amendment and we would consider it prejudicial and deliberate misconduct on the part of the District Attorney to attempt to tell the jury what Mr. Rawls might testify to when he has been advised that Mr. Rawls wouldn't testify.

MR. ROOK [District Attorney]: I should say in view of counsel's statements, you will find that I said I had heard a rumor he was going to take the Fifth Amendment. I am again aware of the information that Mr. Goodwin recited to the Court. I would say that any conduct in relation to the defendant, Mr. Rawls, will be based upon all of the information I have concerning his testimony, and the judgment will be made by me in good faith depending on the information I have available to me at the time that I make my opening statement.

[fol. 7] THE COURT: Anything else?

MR. GOODWIN: It was represented to me this morning by the Court appointed counsel that they had advised Mr. Rook that Mr. Rawls did not desire to testify and would take the Fifth Amendment. We can get them here, and get the attorney.

MR. ROOK: I have not been advised by them. They have not told me that. I have heard that they have advised him not to take it, but they did not tell him [sic: me] that.

THE COURT: O. K.

MR. ROOK: What I heard was they told him he should take the Fifth Amendment and not testify—I think that I said that backward. I meant to say that they advised him of that.

THE COURT: O. K., That is all.

* * * *

[fol. 8] [Indictment]

THE COURT: Ladies and gentlemen of the jury, this is a criminal case this morning brought by the State of Oregon against Martin Rene Frazier. The indictment reads as follows:

"Martin Rene Frazier and Jerry Lee Rawls are accused by the Grand Jury of the County of Clackamas, State of Oregon, by this indictment of the crime of Murder in the First Degree committed as follows:

'The said Martin Rene Frazier and Jerry Lee Rawls on or about the 22nd day of September, A.D. 1964, in the said County of Clackamas and State of Oregon then and there being, and acting together, [fol. 9] did then and there unlawfully and feloniously, purposely and of deliberate and premeditated malice, kill one, Russell Anton Marleau, by strangling the said Russell Anton Marleau, said act of defendants being contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Oregon.'"

* * * *

[fol. 243]

[District Attorney's Opening Statement]

IN OPEN COURT IN THE PRESENCE OF THE JURY

THE COURT: Proceed with your opening statements.

MR. ROOK: May it please the Court, counsel, ladies and gentlemen of the jury, as you know from your civil cases and those of us who have had criminal experience, this is the time when you ordinarily hear the opening statements of attorneys, and the State is going to make the opening statement at this time. I understand that the Court has ruled that defendant may reserve the time to make their opening statement until after the State has presented its case in chief, until we are through with the evidence that we are going to present as part of our case in support of this charge of first degree murder.

Now, to orient you a little on the scene, I would like to describe that first, before we get into these events. (Indicating) this is the map of the general area, and when we are through with the opening statements, my opening statement, at least, this morning, you are going to be taken to the scene by a bus to view generally this [fol. 244] area. This is 82nd Avenue up here. I think the testimony will show on the other side of the street is

the Harmony Inn. Here is the Shell station on the corner, and here is the telephone booth. We expect this diagram and the other diagrams to be offered in evidence so that you will have them with you in the jury room when you deliberate. So if it is small, and you can't see too much at this time, you will have an opportunity to examine it better. This is for the purpose of generally illustrating the area. This is Sunnyside Road. There are side streets on this side of the road, but we will put in 86th and we have indicated houses here. There are some marks here concerning this house, but this is not significant. We will not be offering any evidence in connection with this at this time in our case in chief.

Down here there is Sunnybrook Street, right here, and these are houses. Here is Creek Court at this point, off in this direction, and here is the end of S. E. 86th, right here at this area. This is the area that I am going to demonstrate to you on the next map as we blow up the scene somewhat. Here is the house where Mrs. Rohlfing lives, and these two houses are the Wonderly and MacLeod residences. There is this little driveway to the two houses. We will have photographs in addition, of the scene. We will go to this area where the two fir trees are, I think they are firs, and these houses and this pacture here and [fol. 245] this gully. This is the gully that the evidence will show that the body was found in. And you will have an opportunity to view this as it is today. I think for the moment I won't go into the larger diagram until we have talked a little bit about the facts. I haven't personally talked with the witnesses that the State has and I don't know what it looks like—rather than violate the order we had better check.

Russell Anton Marleau on September 21st, last fall, 1964, was 23 years old. He was working at Hurley's Dairy which is just a little bit south of this bridge—if you know where the bridge is on south 82nd, south of the Shell station, down the hill and back of the Southern Pacific tracks in general in the Clackamas area.

He had worked there about eight months. He worked steadily, and was a reliable young man. The 21st was kind of an important day in his life for more than one

reason to him at that time. He had a 1950 Chevrolet. It was a whitish or greyish color and it had some primer spots on it, and September 21st was the day he was going to buy a new car. He looked at a 1955 Olds and he was planning on buying it. The 22nd of September is the day that these events occurred, when it was discovered that morning. It was discovered by one of the people in these houses.

I think our testimony will be that Mr. Wonderly was shaving that morning a little after 7:00 o'clock, and his [fol. 246] wife said there was a car in the driveway. I don't remember offhand if he finished shaving, but when the time was appropriate he went outside. He looked. He saw this car sitting in his driveway, and it appeared that there was blood all over it and when it saw it he went fairly close, took a look, went in and called the Clackamas County Sheriff's office and said "There is a car in my driveway with a lot of blood on it. Deputy Ryan on the patrol night duty got the call and started for the scene. About this time Mr. Wonderly went back in the house, I am not sure if he got back in the house or was starting back in the house and the other neighbor, Mr. MacLeod came out, and Mr. MacLeod went to the car. Mr. Wonderly went out and they were looking at the area where the car was. Now, let's go to the larger map. Here is an enlargement of the little area on the bottom of the other map. I think we will let Mr. Wonderly and Mr. MacLeod tell us. Here is Mrs. Rohlfing's house, a little shed here, the two trees that you will see and perhaps see a number of pictures of, and by one of these trees this car was parked. And so they went out there and they were looking and they saw in back of this car some bloody rocks. And they looked down over the bank. That is the depression here. It goes down maybe—I don't know—four or five streets [sic] in that area, down along this center line here, and they saw down in there lots of blood, and they saw a trail, what looked like a trail in the tall grass. The [fol. 247] grass was maybe this (indicating) high in that area. They saw a trail, wandered out over in this direction like that, and then Mr. MacLeod—not Mr. Wonderly—Mr. Wonderly felt that he didn't want to see what was

at the end of that trail. Mr. MacLeod walked along the end of the trail, followed it down as it come out in sort of an arc here, this tall area down to the side of this gully. Over in here he saw the body lying there face down with jeans and cowboy boots. Because of seeing the cowboy boots and other things he also went around to the other side to see the face on the body, to see if he could recognize him. He couldn't. He didn't recognize him. And he went back up and then I am not sure of the exact sequence. Deputy Ryan arrived at the scene, and Deputy Ryan saw there was a body, went down there, felt of—I think it was—I don't remember which wrist, felt of the wrist to see if there was any sign of life, touched the body at this point. The body was cold. He could not find a pulse. It seemed to be slightly stiff. So he left the scene, doing nothing further. He went back and called for the State Medical Examiner, Doctor R. C. Henry, pathologist and expert in this area, to come, and for Corporal Pinnick from the Oregon State Crime Detection Laboratory, a technician and specialist in physical evidence, to come, and of course, the Sheriff's office was notified.

A number of people from the Sheriff's office came out to this scene, Corporal Pinnick and Doctor Henry arrived [fol. 248] and the Sheriff, the Chief of Detectives, Lieutenant Thomas and the investigation was assigned to two detectives that work in teams in Clackamas County, Detective Lewis Olsen and Detective William Rotrock, and they were assigned to the investigation.

At that point, of course, they didn't know whose body it was. And the body, after some photographs and some other investigation by these officers, which I will explain to you later in my statement, the body was taken to the morgue for an autopsy to determine the cause of death. At this point they didn't know whose body it was or have any idea how it may have happened, who may have been involved, or the persons around. The possibility on this car, the 1955 Olds, they checked this out of course, and it was some time actually before they were able to discover that Russell Marleau, Jr. had purchased another car, because nobody knew it until after it happened. They

had heard something about it. They didn't know this had happened. It wasn't Russell Marleau's car.

That morning at Hurley's Dairy Russell Marleau didn't show up for work, and the boss waited around and checked a restaurant nearby I think, and then called in the Sheriff's office around noon and started describing him and he was told there was a body at the morgue, why not go there and see if this is him. He went to the morgue and identified this body as that of Russell Marleau, Jr., aged 23, and he had seen him. So they now knew who the vic- [fol. 249] tim was. And they waited then for —I shouldn't say they waited—they worked continually but the autopsy report was of some help.

At this time, out here where the body was found, when the police officers were down to check the body, Corporal Pinnick from the Oregon State police, Doctor Henry, the two chief investigators, at this point were looking for evidence and examining and that sort of thing. The automobile was removed to the Sheriff's office garage, where it was placed under lock and key, waiting for a fingerprint expert from the Oregon State police to come and see if he could find any fingerprints on it and see if they would find any evidence who might have been around the car. The body is observed. We have a number of photographs that will show the foliage that was part way down into the gully. The gully is fairly deep at this point along the gully that you are at. It was headfirst, with the cowboy boots near the edge of the gully. First they took some photographs and eventually moved the body onto the level on the side here and at this point Corporal Pinnick examined the body to see if there was any identification of any sort on it. He was wearing a white bloody T shirt, jeans, shorts and these cowboy boots, that is susbtantially the clothing. There was nothing on the body, no billfold, I shouldn't say nothing, I think the evidence will show there was either a nickel or a quarter or both in one of the pockets on the body, if I remember correctly. But there [fol. 250] was no identification, no way to tell who it was. At this time they still didn't know. It wasn't until he was identified later by someone from Hurley's Dairy that

they discovered who it was. The body was taken from here to the morgue, where Doctor Henry took some more photographs of the body in the condition it was. One of the interesting things about it was there was a belt, very, very tightly around the neck, the body's neck, Russell Marleau's neck, and it appeared to be his own belt, very tight, and it still was in place. The head of this body was grotesquely beaten. We have the photographs to show you the manner of the beating. It was a terrible beating and at the morgue they took photographs before the body was cleaned up, and after it was cleaned up, for the purpose of making the examination.

And Doctor Henry proceeded to examine and attempted to determine the cause of death. On the upper left-hand area there was a gapping hole. There will be a photograph of the skull fracture there, and the depression where that portion of the skull went down in, and where this is an open wound through to the skull. And there were many other marks on the body, marks on the arms and elbow, what the criminal investigator, Doctor Henry, pathologist, refers to as definite marks of blows in this area, no marks on the knuckles. The knuckles were not bruised and the hands were not bruised. And he proceeded with his examination. The examination revealed [fol. 251] that these blows to the head were very serious, but that apparently would not have caused the death. He would have survived. The belt marks—and Doctor Henry can go into details of how he knows this. He is positive that the man was not choked with the belt that was around the neck, because the marks were marks that were made after the circulation had stopped, after the man was dead, and this belt was apparently placed on his neck after he was dead or at least tightened after he was dead. He made further examination and from the marks on the neck, the fingernail scratches, the pattern of the marks on the neck, and from the fact that the hyoid bone was broken, the bone above your Adam's apple, he established it, and from further examination inside showing the tissue, and you can tell whether the tissue has been damaged is—the pathologist can—I can't—whether the tissue has been damaged while alive or after death. From this ex-

amination you can determine what killed Russell Marleau was manual strangulation. He was strangled by hands and the belt came on afterward. He also determined that the body had been dead I forget, eight or nine hours when he examined it. I think it was around 11:00 o'clock, on the morning of the 22nd when he performed the autopsy, 11:20 when the call came in. It was around 8:00 o'clock when Pinnick and Doctor Henry got there, and about 11:00 o'clock when he performed the autopsy. He found that shortly before his death Russell Marleau ate. There is food in the stomach that hadn't been digested, hadn't [fol. 252] passed through the duodenum. He can identify some of it. He can identify mushrooms, meat, and I think one other item, I don't recall what it is.

Some of the officers went up and down the street, and they have photographs of Russel Marleau. They are looking, trying to find out who may have been with him. They checked the family and folks. They don't know. The last they heard of Russell Marleau alive, if my memory serves me right, was 5:00 o'clock or 6:00 o'clock that day when he called his sister Carol and asked if she could come to where he was staying at his dairy and fix him something to eat, and she said "Why not come to my house and eat with us?" They left it there, there was a possibility that he might do that. So since 5:00 o'clock he hasn't been heard from. He hasn't been seen since, I think a day or two before by his family, although he was at work the previous night, I think until quite late, 8:00 or 9:00 o'clock that night. His employer will say he was there. That is the night of the 21st, the night before the morning that he was murdered.

And so the officers start checking and they find at the Harmony Inn that this Russell Marleau was there that night with two other persons. One of them is in uniform, I think at least some of the people say he was a Marine, the other person is another young man in jeans and a blue sweater. So we know that. We know at this time that Russell Marleau was in the Harmony Inn with a [fol. 253] Marine or someone in service and they got a good description. So they started to try to find someone matching the description in that area together, and con-

tinuing to check. I moved the map that I was going to use to illustrate. You recall Sunnyside Road runs along up farther here. They find out that a man and his wife were going down Sunnyside, and I don't remember the exact time—let's say it is oh 3:40, maybe it is 3:20, but at any rate they will testify and tell you the exact information. They were going along Sunnyside toward 82nd in a car. The man is going to work and his wife is going to drive the car back and they see two young men, one dressed in uniform walking—note this—walking from 82nd in the direction of 84th on Sunnyside, not walking from 86th to 82nd, but 82nd toward 86th—they are walking from 82nd toward the scene where this happened, rather than away from it. The lady was unable to identify either of these two people at this time. Later on the man subsequently did. But at this time all he knows is that there is a man with the description of the person in uniform and he didn't know what kind of uniform, but a uniform, and the other person he says, if I recall correctly, with a blue shirt and jeans. In fact, I think the evidence will later develop it was a blue sweater he was wearing. In continuing to check we find a number of people in the Harmony Inn who put the three people there together. There are several of those and we will produce those as witnesses to testify as to what they re-
[fol. 254] call and can identify. At this time all they know is a person of this description in this clothing. A deputy sheriff was there, and talked to a marine, and a person in civilian clothing. I don't think he recalls the kind of clothing—the two of them were together. He doesn't recall Russell Marleau there at that time, although the others do, if I remember the evidence correctly, the others do. So they have established that these three people are there together. We find there are two people walking along Sunnyside about that time. Now, the couple that is coming from Sunnyside, I would like to have this map again if you please. I would like to have this—coming along Sunnyside as I told you in this area somewhere in between they see these two people that have been described in this way, it is around 3:20, I don't know, 3:10 or 3:40, before 4:00 o'clock in order to get

to work this man goes in a half mile or something. He gets out and his wife drives back. The wife gets in the car, she noticed, because of the unusual time of the hour alone in the car of looking to see if these boys were here on the way back, coming this way, coming back this way she looked, she did not see them. The man waits, he has other things to do before he leaves, and he comes north on 82nd in his vehicle, and there is a slight upgrade here and he is driving a truck, and as he comes by this telephone booth right here he is in third gear, going around [fol. 255] at this time ten or twenty miles an hour, as I remember it, and he sees in the telephone booth a man dressed in uniform, the same one he saw over here. He is looking very closely, because his wife had just left. He is paying attention. Leaning against the booth with his hands on the booth is the other person who was walking along here, whoever he was, this other person. So these two persons are here when he leaves, and he remembers the time, I think, I don't remember—it is ten minutes to 4:00 or five to 4:00 or five minutes after 4:00, somewhere in that time zone. So the officers, of course, are conscious that there were apparently very likely two persons that were with him in the Harmony Inn earlier, in the vicinity of 1:30 or 2:00 o'clock. And they keep checking around. They find that there are a couple of witnesses who know that as late as 1:00 o'clock or 1:30 they have gone for hamburgers after playing cards, that the car wasn't there. When they got back from getting hamburgers, the 1955 Olds that was found with blood wasn't there. So the officers continued checking and questioning, naturally running down how the persons leave the scene, how they get away, how they go, walking or what, and in checking around the bus companies and etcetera, we discovered that two young men had left that area at about ten minutes after 4:00 in a taxicab. There was a call in to the taxicab company and they were picked up at the Shell station. Now, the cab driver doesn't know who it was. He can't identify these people. He can't tell exactly how [fol. 256] they were clothed, but he picked up two young men here and he took them to a very interesting location. I am getting a little ahead of myself a little here. But

at least, they found out that the two young men were taken to an area about 92nd and Woodstock by a cab driver. This all kind of fits together. They go to this area here, the Shell station, and they check to see for example what they may know here and the attendant at the Shell station that morning got there at ten minutes to 6:00 in the morning or twenty minutes to 6:00 in the morning, although he has worked there five or six years, there has been only three or four times that the restrooms had been left open the night before. When he gets there the restrooms have been left open, and he finds six or eight towels that have pink, redish stains on them, and he doesn't attach any significance to it. He takes them out and burns them.

In checking further, the officers go to the phone booth, and in examining the phone booth they find blood in the phone booth, what appears at this time to be blood. It is later positively identified as blood, I think positively identified as human blood by the technician. They called the phone company, had a workman come out there to get the little shelves in the phone booth because it appears that there might be finger prints and it would help to try to identify whoever may have killed Russell Marleau over here. They also say, "Let's check in the inside and [fol. 257] see if there are any coins in there that might have impressions on them." They find two dimes in there with what substantially appears to be blood on them. One of these has ridges similar to those of the fingerprints, and they take this one to the crime lab to be examined by the fingerprint technician and so they have found blood in here. They found what appears to be blood over here, and in this area. But they still don't have any real lead on who the two men are. As far as the leads they had, they were leading in the wrong direction. They do, however, I think, on the 24th—this is the morning of the 23rd—on the 24th there is a call from the Portland Police Department, and they have received a tip. One of the officers knew somebody that knew something, called in a tip, in effect—we don't want to tell the conversation. In effect, they were advised that Jerry Lee Rawls and Martin Rene Frazier were the ones they were looking for.

Mr. Frazier was a Marine and these two people lived at 9736 S. E. Woodstock, which is the Robertsons' residence, the residence of Jerry Lee Rawls' mother and stepfather. So they go out there and when they get there at about, I am not sure what time they got there, around four or four fifteen. Mr. Frazier is there. Now, this is the 22nd. And Martin Frazier is on active duty in the Marine Corps. He arrived, I believe, the 17th, in the Portland area—yes—on the 17th of September. He flew up. He was granted an emergency leave to attend the funeral of [fol. 258] his mother. His mother had just died. His mother's funeral was to be at 2:30 on September 22nd. So it is now September 24th. The police officers are over here looking to find a Jerry Lee Rawls and a Martin Frazier. They want to talk to them. Martin Frazier is there. I think he is in bed, if I remember correctly. He gets up and he goes with the police officers. I think they leave around 4:15, come to the Clackamas County Detective Bureau, where Detective Olsen or Detective Rotrock asked him about these events, and because of some legal questions, I don't want to go into all of the conversations, because there will be some contention between the defense and prosecution in this area. Eventually, after—I am not sure of the time—it is—I think it is a little after 6:00 o'clock, Martin Frazier signed a statement for the police officers.

MR. GOODWIN: I move for a mistrial. We have made our position known on the record concerning this statement until the Court made a ruling as to whether this statement is admissible. The District Attorney knows it is error to mention statements.

MR. ROOK: It is not error.

THE COURT: The motion is denied. You may proceed.

MR. ROOK: He signed a statement for the police officers and he told them generally in the statement the story of what had taken place that night. I don't know that in an examination of it you will necessarily find that [fol. 259] everything that he said in the statement is true, but he admitted to the officers that he and Jerry Rawls had been out that night, that they had gone to a tavern

on 92nd and Woodstock, they were walking, they had something to drink, and went to Coulee's Tavern, and then went down to a tavern called the Spot 79 on Foster. They had something there to drink, and they were walking down the street and this man stopped and picked them up. This man was driving an Oldsmobile. They went down to the Harmony Inn and they got there about 1:00 o'clock. After about twenty minutes at the Harmony Inn he told the police officers that he wanted to see a girl friend and he wanted this man to take them to see the girl. They leave the Harmony Inn to go see the girl, went out and started to turn on Sunnyside Road, turned around and came back. The driver of the Oldsmobile apparently seen the State police, and wanted to go back to the Harmony Inn. They went to the Harmony Inn. In this part of the statement our witnesses there say that the people left and came back in about five or ten minutes, around this time. They got back in. They had something to drink. I think Mr. Frazier said that he got a coke and a hamburger, and Jerry Rawls had a drink and then about 2:30—closing time—they went to look for the girlfriend's house. It is a girl friend of Martin Frazier, and it is Martin Frazier that wants to look for her. They went down to the end of 86th Street and Martin Frazier asked the driver of the car to stop the car. He wanted [fol. 260] to walk to this girl's house to see if he could find her. They stopped. They all got out of the car, and this man driving the car took his keys out and Jerry and Martin got out went around the car and the man driving the car, according to the statement from Frazier, made a pass at Martin, Mr. Frazier. He said that the man driving the Olds tried to unzip Private Frazier's pants. He says that he shoved this man away from him against the car and the man came at him again and that he then hit him in the mouth, Frazier hit this man in the mouth and all this man did was laugh, and so Jerry Rawls was standing beside him, so this man came at them and they started a fight and all three of them went down the side of the hill that I described and they fell and he was still laughing and the man was so much bigger than he was he picked up a rock and hit him on the head, and he hit

him twice, and that Jerry Rawls was on his knees and this man hit Jerry with something in the nose, and that Jerry hit this man with his fist several times. He said the fight lasted about five to seven minutes, something like that. They were scared so they pulled him off into the ditch. He said Jerry was in front pulling him, that he had hold of the feet, walking behind him and they dumped him in the ditch. He said Jerry fell in the ditch and climbed back to where they had been fighting and they found the car keys and they tried to start the car, the Olds. They had the wrong key. Martin said, "I broke the key off in the ignition," and so he said he broke it [fol. 261] off in the lock. Then Martin Frazier says that they went to the washroom in the Shell station, washed up and called a radio cab from the phone booth by the Shell station on 82nd. They waited about 15 minutes for the cab and when they got there the cab took them to 92nd and Woodstock. They paid the fare there and walked to Jerry's house. This is the Robertson residence. It was still dark when they got there. They went into the back yard and started a fire in the barrel, and burned the clothes that they were wearing and he was wearing a Marine uniform. He said they went and cleaned up and went to bed and they got up about 10:00 o'clock that same morning and at 2:30 that afternoon he went to the funeral.

MR. GOODWIN: At this time for the record, I want to renew my motion for a mistrial on the basis that counsel has in effect read a statement not in evidence or on which there has been a ruling, and is presumed to be involuntary.

MR. ROOK: This is evidence we intend to prove.

THE COURT: Based on the fact that this is what he intends to show, I will overrule your motion at this time.

MR. ROOK: So the officers now had an idea—they had some information as to how it happened. Whether the information is reliable, they had some information. They continued to do the checking—they got fingerprints of this defendant, fingerprints of Rawls, they talked to Rawls. We are going to call Mr. Rawls as a witness in this case, and expect that he will testify substantially in

[fol. 262] the same general area although with some differences because it is Rawls' version that Marleau never mentioned anything about sexual attacks or approaches or anything like that. He says Rusty, that was driving the Olds, was driving too fast and they were afraid and they wanted to stop the car and get the keys. When they tried to take the keys a fight ensued. Mr. Rawls says that Rusty got out of the car and came around the other side of the car and then walked toward Rawls and that Rawls hit Rusty first. This is Rawls' version; that there was an argument back and forth about the keys to this car and then Rusty hit Rawls. Maybe I am wrong. I will look here as to whether Rawls said he hit him first. No, I guess it is Rawls' position that Rusty hit Rawls—the man in the Olds hit Rawls first in the nose and knocked him back a little ways and Marty jumped out of the car and Rusty said something to Marty but Rawls didn't hear what it was. Rusty grabbed hold of Marty and Rawls walked to him and told Rusty to let go. Marty and Rusty didn't pay any attention to him, so Rawls says that Marty picked up a rock off the ground and hit him in the back of the head. All three struggled and fell over the bank. When they fell down Rawls said he kicked him in the ribs a couple of times and he was standing up then and Marty and Rusty were on the ground and he didn't know how much fighting went on there but he started to run back up toward the car. Rawls said he tripped trying to run up the bank on some wire, and there is wire, and he fell back down and he could hear Rusty [fol. 263] gasping but he didn't say anything. He then threw the rock that he had used in back of the car and Marty also threw rocks in back of the car. They then both started to drag Rusty toward a spot in the field that they had picked out; that Rusty was on his back and Rawls had a hold of him underneath the left arm-pit and by the trousers. Marty had a hold of him by his right side, but he didn't know what part exactly he had hold of. They stopped dragging him by the edge of the ditch and he, Rawls, fell in the ditch—after he slipped that he went to the other scene where they had been fighting and they kicked dirt over the bank where the blood was and

that Marty got in the car on the driver's side and put a key in the ignition, got the key in but broke it off. That since they couldn't drive the car then they walked over to the Shell station on 82nd. They went to the rest room and washed the blood off and then they went to the phone booth and Marty went inside and called and he stood by the phone booth, and the cab then came out in five or ten minutes to pick them up. He said "We took all of the clothes off after we got home and put them in a travel bag, and went to bed about 5:00 o'clock in the morning." He says that when they got in the taxicab they both took off portions of the bloody clothing. He took off the sweater and Marty took off the shirt, as well as the hat, and they got off. Then the next morning when they get up Marty took a gold-colored cigarette lighter from his pocket, [fol. 264] threw it on the bed, said "That lighter belongs to that guy last night." And Rawls recognized the cigarette lighter as being one that Russell had had at the Harmony Inn.

So then, the question becomes—how do we tie this together in the absence of just what the people said? How do we prove it by independent evidence—with the investigation, of course, proceeding in its normal course of events, some checking was done. It was found that there were a whole batch of fingerprints on this car, some in human blood. It was positively identified as human blood. And one of them was identified positively by the fingerprint expert as being a particular finger on Marty Frazier's hand, so he was at that car at a time when there was blood on the car at least, because the fingerprint was in that material. Later that night at the time Rawls was arrested when he came home—it was around 10:00 o'clock, 9:30, in that area, they also found this travel bag in which this clothing was placed, and in this bag.

MR. GOODWIN: I want to make the same objection about the travel bag. We have already made our record on that, that this bag was taken without any warrant.

MR. ROOK: I don't think he should argue the search and seizure question here. It has already been argued and ruled against.

THE COURT: So that the record may show your ob-

jection you may make your objection. However, it will be overruled.

[fol. 265] MR. ROOK: In this bag was found the other half of the key from the car—the officers took the front part of the key out of this '55 Olds. He gave it to Corporal Pinnick, State Crime Lab, and the other half of the key, the back half was found in the bag. Corporal Pinnick will testify positively absolutely that it was part of the same thing. It is the kind of thing you will see by the marks. It doesn't take an expert to tell probably.

The cigarette lighter, however, showed up later when Mrs. Robertson and her daughter-in-law, after the arrest later on were checking the items that were still there. The boys were in jail. And they find this cigarette lighter in Martin Frazier's pocket, and they called the Sheriff's office and turned it over to them, and the cigarette lighter is identified I believe, by a man from the dairy as being his—his family will testify to him having this type of cigarette lighter in color and shape.

Now, that is part of our claim that I have indicated to you in voir dire concerning robbery. Now, the other part deals with the contents of these pockets. We don't exactly know what all he had in his pockets, but when his clothes were examined at the crime lab, he will testify that in at least one of the pockets there was a bloody hand, that when the body was examined there was nothing in it, no identification, no billfold, no nothing, except perhaps—I [fol. 266] am not sure—I recall one coin or two, and in one of those pockets there had been a bloody hand. Now, the billfold has never been found, but this diagram will show something about this in the evidence that I am going to mention over here. This is the home of the Marleaus. Rusty wasn't living there at this time. This is where the family lives. He lived at Hurley's Dairy. He wasn't there to eat. Here is 9736 S. E. Woodstock, the Robertson residence where the two people were apprehended, Martin Rene Frazier and Jerry Lee Rawls were apprehended. Over here is—the Lent School is—here is the corner of 95th and Woodstock. The reason this is significant is this. About a month later, I don't remember the time, a boy by the name of Jerry Atkeson, aged about thirteen

or fourteen, and George Marleau—they had gone over that day. They walked over that day from the area where they lived to the Lent School, to goof around, I think is the phrase they used. On their way back, they come by —they are walking by 95th and Woodstock, and Jerry Atkeson and George Marleau, the fourteen year old brother of the dead man, see some papers kind of scattered around by this telephone pole. I think one was clear across the street on the other side of the street, and Jerry Atkeson looks down and grabs a piece of paper and looks at it. He sees the Marleau name on it. He sees Russell Marleau's name on it, and so he calls out, "Here are some of your brother's papers." They gathered them up. On [fol. 267] the other side of the street is another piece of paper and they take them home and call the Sheriff's office and turn them over. This is directly on the route from where the taxicab let the two men off that night to the house where they went right here. The billfold wasn't found, but the contents with some papers with Russell Marleau's name on them, the card, a radio fan club card is positively identified by several of the people. The two boys placed initials on some of the items and we will offer the contents of that, the contents of the billfold which we believe these to be and the testimony will be that these are the items that he carried on him from that location where they were found right there. Now, as far as the automobile is concerned, of course it was quite a while before they were able to trace where he got the vehicle. We did find out around 9:30 that night he traded the car. This is one of the problems, because this Oldsmobile was not identifiable with Marleau until we found out about 9:30 that night he bought this car at a service station and the man he bought it from, I believe, is out of the State. We have a person who was present at that time who we will call to testify about those events, who was there when the transaction took place.

One thing I forgot to mention about how these people ran into this Olds, how the two boys ran into the Olds. It is Rawls' contention that he and Frazier had come out of this Spot 79 and the fellow in the Olds—I don't recall if he was driving or stopped, or got out—Frazier had

[fol. 268] called to him and said something like "Let's have a drink" or "Let's have a drink together" or something to that effect. Frazier had called to the dead man when he was in this automobile.

Now, the experts from the crime lab will testify about these items of evidence. Excuse me a moment. We have a number of them. I don't know how long it will take to go through the mechanics of putting them in. We have, for example, these three rocks that were found right in back of the Olds the next day with material on them that has been identified as human blood, and human hairs on the rocks. We have found, I guess it would be about three or five or something like that, rocks, some with human hairs, all with blood on them. This wrist watch was not on him at the time, but was found at the scene in the grass, we have that. We have the clothing from this bag. We found Martin Frazier's clothing, which most of it has blood on it. There was some concern as to why he didn't wear this to the funeral. He did not wear his uniform to the funeral. He wore civilian clothes. We have also —I guess I can't say that—we have the clothing of Russell Marleau, and we also have some samples of material scraped and taken from the car in various places, the blood alcohol content or how much to drink, so to speak, Marleau had had was taken and examined by the State police, the State police lab, and we will offer testimony as to how much Marleau had had to drink and what effect it would have on a human being. We have the bag. We [fol. 269] have the belt that was around his neck when he was dragged across this area to that ditch, and we also have a newspaper clipping of it. Of this event from the paper that was found on Mr. Frazier when he was arrested.

In addition to that, we expect to have the trip ticket of the cab driver, a number of items of evidence, plus these photographs. I can't, of course, at this time, probably remember everything we have in the way of evidence, nor all of the witnesses that will be called, but I have tried to present an overall picture with some of the features of the evidence that we have, so that as this evi-

dence is presented to you that you will be able to understand it.

The testimony of the pathologist will show, in addition to what I have already told you, for example, it will show hemorrhages in the whites of the eye which are significant of the manner of death, that is, that it was strangulation, and not the rock beating that did it. The hemorrhage inside the neck, and they were all examined, the brain was examined to see what the damage was there, if any, and the beating was determined not to be fatal, severe, not fatal. I have one more witness to mention before I close. In this house, one of the houses over here, there is a lady who maybe was a light sleeper; anyway, she woke up that morning and she heard some noises. She heard several voices, and there seemed to be some angry voices, and she got up and went to the window to see [fol. 270] if she could see anything. It appeared to be coming from the area this car was parked in. She looked but there was heavy fog at that time of the year, and she couldn't see anything. She could hear the voices, couldn't make out mostly what they were saying. They were angry voices, and more than two voices. She heard someone say "Let me go." And she heard thuds, thuds, many, many thuds, like, she thought fists, perhaps. Later, she heard in a much weaker voice the word "Help" and there many, many thuds. She said these events took place over perhaps fifteen minutes.

* * * *

[fol. 271] [Motion for Mistrial]

(IN CHAMBERS OUT OF THE PRESENCE OF THE JURY.)

MR. ANICKER [Attorney for Fraizer]: We would again like to renew our motion for a mistrial based on the opening statement of the District Attorney, particularly his reference and in effect reading from a written statement which he was holding in his hands as he was addressing the jury, a statement, of course, the Court isn't advised on this, but we had an opportunity under Court order to listen to the electronic transcription, and it showed

on the transcription his written statement was taken after Mr. Frazier asked for an attorney and he was advised by the police officers that he could have an attorney after in effect he had given them a written statement. So obviously it is inadmissible.

THE COURT: What do you say?

[fol. 272] MR. ANICKER: That the written statement was taken after Mr. Frazier asked about an attorney. He was advised by the police officers he could have an attorney after he gave them a written statement, making the statement inadmissible. At the very best, as far as the State is concerned it is very questionable. We feel that quoting this to the jury has put this matter in their mind, that they would not be able to disregard it in the event that this confession is not admitted into evidence, which we are sure will not be.

MR. GOODWIN: Also, the matter with reference to the property that was received without warrant, the contents of the bag, the clothes and so on, and the reading from the statement of Jerry Lee Rawls who we understand has advised the District Attorney that he is going to take the Fifth Amendment.

THE COURT: You are not representing Mr. Rawls. I will approach that matter when he appears. If he has pleaded guilty to that particular charge, I think this is a matter for the Court to determine whether he can take the Fifth Amendment. It wasn't my observation that the District Attorney was reading from any statement. I don't know. Were you, Mr. Rook?

MR. ROOK: I was not. I was referring to it.

THE COURT: He had a statement in his hands, it was obvious he had some kind of a paper in his hands.

MR. GOODWIN: The record will show how close it was.

THE COURT: I agree that the State must first prove [fol. 273] to the satisfaction of the Court that a statement was given voluntarily, and that there was no deprivation of the defendant's rights, constitutional rights before any such statement or confession or admission can be admitted to the jury for their consideration. I don't know whether this will happen or not. This is up to the

District Attorney. He should be allowed to present his case as he sees it.

MR. GOODWIN: It is deliberate misconduct where he has been warned. In the event that the statement is not received in evidence we are entitled to a mistrial.

THE COURT: If it isn't received the jury will be told to disregard.

MR. GOODWIN: The Supreme Court has said several times that telling the jury to disregard such matters doesn't give the man due process.

THE COURT: We have at times told the jury to disregard something that is within the discretion of the Court, and if the Court feels that they can put this out of their minds and go further with such instruction that it isn't proper.

MR. GOODWIN: Where it is deliberate misconduct after a warning and after a position stated and the authority having been cited, I think that is something else.

THE COURT: There is no warning. I didn't warn him not to do this.

MR. GOODWIN: We did.

[fol. 274] THE COURT: You have stated your position previous to the trial. There are two theories to be presented in this case. One is the State's and one is the defense and it is up to me to decide what is admissible, and I will do so, and I am not saying that I am always right.

MR. GOODWIN: I am not trying to argue. I want the record to be perfectly clear as we go along.

MR. ROOK: I think in view of the allegations made against me by Mr. Goodwin, that I should not have any admissions by silence, in view of the record. He stated, for example, that I have been advised by Mr. Rawls that he plans to take the Fifth Amendment. I deny that. I am aware of his warning that I shouldn't use these items that were taken from the bag. I am aware that he filed a motion to suppress the evidence, and the motion was denied. I deny deliberate misconduct. I studied and examined the points. I could have gone a lot farther, as Mr. Goodwin knows. I could have said a lot more. I tried

to stay well on the side of propriety, and I deny any misconduct.

THE COURT: O. K. Let's go.

* * * *

[fol. 476] [Tape Recording of Interrogation]

THE COURT: Let the record show that we are in chambers where it is possible to be a little more informal and it is also a smaller room where the tape can be heard better, in the presence of the defendant and his counsel [fol. 477] and also the District Attorney, we have assembled to listen to this tape. You may proceed.

"Q What is your full name, Martin?

A Martin Rene Frazier.

Q Is that Rene?

A Yes, R-e-n-e.

Q Frazier, F-r-a-z-i-e-r?

A Yes.

Q What is your address here? You are in the Service. What is your address here?

A 9734.

Q Where you just were?

A Yes.

Q Court, or some darned thing. Do you have a phone number there?

A I don't know it.

Q That doesn't make any difference. What is the date of your birth?

A August 23, 1944.

Q August 23, 1944?

A Yes.

Q Were you born in Portland?

A Yes.

Q You are in the Marine Corps, and what are you, a private?

[fol. 478] A Yes.

Q How long have you been in?

A Three years.

Q Have you been in California all that time? Have you been stationed there all of that time?

A All three years?

Q Yes.
A No.
Q When you first went in you were in California?
A Yes.
Q How long were you there?
A Approximately seven months.
Q Seven months?
A Yes.
Q And you went from California to where?
A To Okinawa.
Q To Okinawa? How long were you there?
A Fifteen months.
Q Fifteen months in Okinawa?
A Yes.
Q And then you came back and you have been there ever since; have been down there this time about a year, pretty close?
A It would be in March.
Q What is the name of the camp?
[fol. 479] A El Toro.
Q Have you ever been in trouble before, Martin? Have you ever been arrested before, done any time?
A Yes.
Q When was it? Where was it, and what for?
A AWOL.
Q You were AWOL?
A Yes.
Q What year was that?
A This year.
Q '64?
A Yes.
Q What month, do you remember?
A April, I believe.
Q April. Just this summer?
A Yes.
Q Did you turn yourself in, or did they find you?
A I was trying to get back to the United States.
Q Did you do any stockade time for it?
A Yes.
Q How long?
A Four months.

Q I assume this was in the El Toro stockade?
A Yes.
Q That is the only time you have been pinched, since [fol. 480] you were there?
A No.
Q Did you have to do any time after that? Have you ever been arrested before for anything?
A Yes.
Q Now, this time that you got caught, what was the deal? Did you get caught for a traffic ticket, you say?
A It was a routine traffic ticket.
Q By whom were you caught, the deputy sheriff or—
A It was the State Police.
Q The State Police?
A Yes.
Q How many uniforms did you bring up here for this time, Martin?
A One.
Q How come you were up here? How come they gave you a leave after your AWOL like that?
A My mother died.
Q What did you get, an emergency leave?
A Twenty days.
Q Twenty days?
A Yes.
Q When did that take effect?
A When it started, last Thursday.
[fol. 481] Q Last Thursday?
A It was up this coming Monday.
Q When was the funeral for your mother?
A Tuesday.
Q Tuesday?
A Yes.
Q What happened to your uniform?
A I put it in the cleaners to have it ready for the funeral Tuesday. I took it to my girl friend's house and I hung it in the car.
Q On Monday night you had it on, that was the 21st?
A Yes.
Q Where did you take it to the cleaners?
A I just got it out of the cleaners before.

Q You got it out Monday?
A I believe it was—I took it downtown.
Q You got it out of the cleaners Monday?
A Yes.
Q You wore it after you got it out of the cleaners Monday night?
A That is right.
Q But you got it dirty, so you took it back to the cleaners after you got it dirty?
A No, sir.
Q You just had it hanging in the car, dirty?
[fol. 482] A Yes.
Q Whose car were you in?
A Mickey Davis.
Q Was that your girl's car?
A A friend's.
Q I see, Mickey Davis is a boy. What kind of a car does Mickey have?
A I believe it is a Monza.
Q What color is it, do you know?
A White.
Q Is it a hardtop?
A Hardtop.
Q Where does your girl friend live?
A 4515 North Laurel.
Q That is over in St. Johns?
A Yes, I think that is where it is.
Q What is your girl friend's name?
A Juanita. I can't remember her last name.
Q You can't remember her last name?
A No.
Q The first name is Juanita?
A Yes.
Q How old is she?
A Twenty years.
Q Did you go to school with her, or something? Is
[fol. 483] that how you happen to know her?
A She was a fresbman..
Q How did you meet her, through your cousin?
A Yes.

Q What is your cousin's name?
A Jerry Rawls.
Q R-a-w-l-s?
A R-a-w-l-s.
Q Do you know what Jerry's middle name is?
A No.
Q Does he live with his parents?
A Yes.
Q When did you enter the Marines?
A September 11, 1951.
Q You had your uniform cleaned, and you got it out and you wore it Monday night, when you and your cousin went out?
A Yes.
Q And you say it got dirty. What did you do, spill something on it?
A My shoes—I got black polish on it.
Q Where did you have your uniform cleaned?
A It was downtown. I don't remember the place, the name of it. You could get it the same day.
Q You put your uniform in when?
[fol. 484] A Friday.
Q Friday morning?
A It was Friday noon.
Q This was a cotton uniform, was it?
A Cotton uniform.
Q Garrison cap?
A Pisscutter.
Q An overseas cap?
A Yes.
Q What is it called?
A Pisscutter.
Q Pisscutter?
A Yes.
Q And khaki shirt?
A Trousers, shirt, tie, cobler collar.
Q And a so-called field scarf?
A Yes.
Q Was the whole business cleaned?
A Yes.

Q Now, do you know the name of the outfit that cleaned it?

A No, I don't.

Q Do you know where it was located?

A Right off Broadway.

Q Broadway and what?

[fol. 485] A It was by that big theatre, all the way down the end.

Q Paramount?

A No, it is down farther, up toward the hill.

Q Near this big theatre?

A Yes.

Q That was last Friday night?

A Friday afternoon.

Q The 18th? Is that when you came in from—

A I flew in Thursday night at midnight.

Q You came in at midnight from where?

A El Toro.

Q How did you come in, commercial?

A Yes.

Q And the next day is when you took this uniform over town?

A Yes.

Q Where did you stay the first night?

A At my aunt's place.

Q Out here on Woodstock Court?

A Yes. My cousin came out and got me at the airport.

Q Which one?

A Wayne and Jerry Rawls.

Q Both of them?

A Yes.

[fol. 486] Q The next day is when you took the uniform to town. How come you took it way over on Broadway?

A Right around where Jerry lives there are cleaners, but it takes three days to get things cleaned. I wanted to wear it to the funeral.

Q When did you get it out of the cleaners?

A 5:00 in the afternoon.

Q The same afternoon?

A Yes.
Q Now, did you wear it to the funeral?
A No.
Q What happend to it?
A I got the polish on it and—
Q Where were you Monday night?
A We went to a few places around his place.
Q Where is that?
A In a tavern.
Q O.K. Let's name the taverns.
A Conlee's Tavern.
Q Who do you mean, "We"?
A My cousin and myself.
Q I see. Now, which cousin was this?
A This was Jerry Rawls.
Q Was anybody else with you?
A No, sir.
[fol. 487] Q Just the two of you?
A Yes.
Q What did you use for transportation?
A Walked, right around the area there, right near his house. I went over to my girl friend's house and stayed there for awhile.
Q How did you get over there?
A Bus to Foster, downtown and out.
Q Was Jerry with you?
A No.
Q You went by yourself?
A Yes.
Q What time would you have gotten over to your girl friend's house?
A Around 10:00 o'clock.
Q That night?
A Yes.
Q Well, when did you come back from your girl friend's?
A I missed the last bus. The last bus was at 1:15. I just missed it.
Q Where did you leave your uniform?
A I left it there.
Q What did you wear?

A I had some clothes there.

Q Had these clothes been there since you went in the [fol. 488] Service? How did they get over there?

A I was over there Saturday, that is why they were there.

Q What kind of clothes did you have over there?

A These white Levi's, a shirt and shoes.

Q Well, I think there are some things that you are leaving out of this. I mean, between what happened the night you got home and today. Isn't there something that you should be talking about that you haven't mentioned yet?

A No.

Q Well, you see, we asked you if you would come here today, because we wanted to talk to you, and you didn't object to coming. There are certain things that we want to ask you about, and if you want an attorney, why you can have an attorney. We want to question you about some things that might be important to you, at least they are important to us. What you say here could be used against you in a trial, you understand that?

A Yes.

Q You have been through this business before, I am sure, so you are aware of that. Now, we know that you were not altogether in the area of Scotty's Monday night, or early Tuesday morning. We know that you were at the Harmony Inn, and we know who you were with. We [fol. 489] are talking about the boy who was killed. We have witnesses that say you were there and that you were with him. We know that. So, instead of a long, drawn-out affair here, without questioning you about it, why don't you tell us.

A Tell you what?

Q What happened.

A About what?

Q About where you were that night, Monday night, and early Tuesday morning.

A Well, like I said, we were fooling around, we were feeling pretty good. We went down to Spot 79 and we went down to some tavern—it was closed, and then it was opened, I don't recall where it was.

Q Where?
A It was on Foster somewhere.
Q Were you not down at the Harmony Inn?
A I don't know.
Q You know where the Harmony is. You have been in this area. You know where it is.
A Yes.
Q Now, were you in there late Monday night or early Tuesday morning after midnight?
A I was with my girl friend.
Q What time was that?
A I left there about 10:00 o'clock, 11:00 o'clock.
[fol. 490] Q It was later than that. Let me tell you something. One of our deputy sheriffs talked to you at the bar when you were sitting on the stool. That wasn't 10:00 o'clock was it?
A I don't know what time it was.
Q O.K. It was between 1:00 and 2:00 in the morning. Who were you with?
A My cousin.
Q You were with this guy right here and Jerry, that is right, isn't it? Because our deputy sheriff saw you with them, together. So did the bartender, so did the cook, so did half of the people in the place. We saw you leaving with them. You were also seen on 82nd. You caught a cab out of there. The cab driver said you were the guy. How do you think we got to you, Frazier? You won't tell.
A Are you trying to tell me that—
Q I am not trying to tell you anything. You tell us. We would like to have you tell us about this thing. Do you know where Jerry is?
A I think he is over on 97th. That is where I left him.
Q We know where Jerry is. Jerry has talked to us. Jerry has told us the whole story.
A Where is he?
[fol. 491] Q Where do you suppose he is? He is not out walking the streets. He told us what happened.
A I don't know what Jerry told you.
Q We know. There is no use you trying to fool us. You are going to have to face this. So that we won't

have to sit here an hour or two hours, would you just as soon tell us now and get it over with?

A I haven't got nothing to tell.

Q Oh, yes, there is. Did you do it all yourself?

A No, there were a couple of us.

Q What was the reason? Now, it is my understanding Jerry claims that he was driving too fast and you guys tried to slow him down, is that right?

A I don't know anything.

Q You don't? Which one of you called from the telephone booth?

A What telephone booth?

Q The telephone booth that you called from after this guy was beat up?

A (Long pause).

Q We got some bloody coins out of the telephone with the fingerprints on the coin. You were seen. We are not playing Jekyll and Hyde, or anything like that. You wouldn't be here if we didn't know what you were here for. You know that, don't you, Marty?

[fol. 492] A Yes.

Q You got a problem here, the two of you. The two of you are in it together. The two of you are going to see it out. Is one of you going to take the blame for it, or are you going to share it together, Marty, that is the question. I know you just went through the death of your mother, and I am sure that it shocked you quite badly. And I feel sorry for you. I feel sorry for anybody that has lost his mother. And you know that she wouldn't condone this type of thing had she been living today, would she? So you have to live with your conscience. I am sure you don't want to drag this out any longer than we want to drag it out. We would like to wrap this thing up, so to speak, and get you over there where you can get something to eat and get some rest. I know you haven't had anything to eat today, have you?

A No.

Q All right, do you want to tell us what happened? I have an idea how you feel. It is a miserable feeling, no doubt. What did this guy do that caused all of this trouble? Is there something that he did to start the trou-

ble? Was he a normal man? You have been around enough to know what I mean.

A No.

[fol. 493] Q He wasn't? What is he, a homo?

A Yes.

Q Did he make an overture to you?

A Yes.

Q He did?

A Yes.

Q How did this come about? How did it happen that you were propositioned?

A Well, we were going to Spot 79, and he pulled over.

Q You met him at Spot 79?

A We were out on the street. He picked us up.

Q What kind of a car was he driving?

A I don't know.

Q What color was it? Do you remember?

A White.

Q Was it brown?

A White.

Q Go ahead, Marty, tell us what—we are satisfied it isn't a one-sided affair. We kind of suspected this was that kind of a deal.

A That doesn't do me no good.

Q In any event, he picked you up. Where did he bring you?

A We went to the Harmony from there.

Q And was there any play at the Harmony?

[fol. 494] A Yes. We were standing at the bar and he put his hand on me. I told him to keep his hand to himself. And he came out, and he took a coat out of a car. He stole it.

Q Oh, he did steal a coat?

A Yes.

Q What was it, a man's coat or a woman's coat?

A It was a woman's coat.

Q And what did he do with the coat?

A He put it in his car. I took it back.

Q O.K. Did you get in the car with him, then?

A I wanted to get home. It was a little far to walk.

Q What time was this, about? What time did you go out to the car when he stole the coat?

A It was pretty late.

Q After 1:00?

A I think so.

Q You left the Harmony once, and came back. Is that right?

A I think so.

Q Why don't you go ahead and tell us, after you got the coat out of the car, what happened then? Was he driving? Did he drive the car?

A Yes.

Q And you guys were with him in the front, or in the [fol. 495] back?

A In the front.

Q Who was sitting in the middle?

A Me.

Q You were in the middle?

A Yes.

Q Where did you go then?

A To another tavern. He was going like a bat out of hell. He laughed at anything. Everything was funny.

Q Was he drunk?

A It seemed like he might have been.

Q O.K. Where did he go?

A I don't know where.

Q You turned off 82nd. Is that right? Do you remember going down any street?

A 82nd.

Q I mean, the other street. Right there at the station, do you remember turning and going down that road?

A I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now.

Q You can't be in any more trouble than you are in now. You have been with him, and you have gone down 82nd with him, and you say he started this whole busi- [fol. 496] ness. So you turned down the street. And who persuaded him to park the car? Was this his idea to park the car and get out?

A It was my idea.

Q What were you trying to do, get him out of the car?
A I was trying to get out, myself. The way he was driving, if you jumped out you would kill yourself.
Q How did he happen to drive you down that street off of 82nd?
A A girl I used to go with used to live on that street.
Q What was your girl's name down there?
A Linda Bradford.
Q What street does she live on there, 86th?
A That's the last I remember.
Q O.K. Now, did you get past her house? Did you get to it at all?
A Did I get to it?
Q Yes.
A No.
Q Did you go by her house at all?
A I think I did.
Q You think you did? You think you passed it when you went down?
A When we went down, and I walked back up.
[fol. 497] Q Well, did you know where you were when you got to the end of the street?
A I knew where I was. She was around that area somewhere.
Q Now, did you ask him to stop the car, down at the end of the street, did you ask him?
A I wanted to get out.
Q Oh your intention was to leave him there?
A Yes.
Q But you didn't leave him there. You didn't walk out of the car and leave?
A No, I didn't.
Q What happened? The fight started, didn't it? What happened? Didn't he want you to leave?
A No.
Q What did Jerry think about it?
A He wanted to get out, too.
Q What initiated the fight? How did it start?
A He was a God-damned queer.
Q We suspected it. It was possible. What approach did he make to you there? Did he take his pants down?

A Oh, he started playing around.
Q He did with you, or Jerry?
A With me. I think he tried it with Jerry, I am not sure.
[fol. 498] Q Now, were you out of the car at that time?
A Yes.
Q Which, out on the driver's side or the other side?
A I think I got out myself, I am not sure.
Q I see. How did the fight progress? What happened? Did you hit him?
A I just shoved him to get away from him.
Q Did you shove him over the bank?
A He was up against the car. I started to leave. I said, "Get away, and leave me alone."
Q After he was shoved, what then happened?
A He wouldn't leave me alone.
Q What did he want to do, go down on you?
A Yes.
Q I can understand why you object to that, naturally. But how did the real fight start? Did you pick up a rock and hit him?
A No, I hit him in the mouth.
Q With what?
A My knuckles.
Q Now, did this knock him down?
A No, he just stood there. He didn't do anything.
Q Did Jerry help you?
A He laughed.
Q Then you and Jerry got scared?
[fol. 499] A Yes.
Q Did the both of you jump on him, then?
A He went down over the bank then.
Q Did he get knocked out when you went down over the bank?
A No, he was laughing.
Q Now who was hit? Who hit him with the rocks?
A I might have.
Q This is critical to you, of course, but either you did or you didn't. Now, did you?
A I think I did.
Q All right.

A I know he was hit on the head with a rock.

Q I imagine he was. It is a pretty big drop. Was his pants down, then?

A Oh, no.

Q Now, Jerry was helping at the time that he was shoved over this bank?

A Yes.

Q Now, the two of you, what did you do? Did you beat him while he was there?

A No. He was as strong as a bull. He was laughing. He wasn't a bit scared.

Q Was he crying?

A No, he was laughing.

[fol. 500] Q Were you crying?

A I think I was.

Q Now, the two of you beat him with a rock? Did you grab his head and slam it against the rocks, or did you get the rocks and beat him with it?

A I wanted to knock him out and get out of there.

Q You sure knocked him out, all right. Did you put the choker on him? Do you remember choking him?

A No.

Q You didn't choke him at all? You didn't have your hands on his neck?

A No.

Q Who put the belt around his neck?

A The belt?

Q The leather belt?

A I didn't do that.

Q You didn't do that?

A No.

Q Did you help him drag him over to the bank?

A I carried his feet.

Q How long do you suppose it was that the fight was carried on there?

A About five minutes.

Q Was it light out, or was it fairly dark—I mean, was there moonlight?

[fol. 501] A No, it was pretty dark.

Q Do you think this was some time between 3:00 and 3:30?

A No, I know it wasn't that late.

Q Had the Harmony closed when you guys took off, or was it closing when you left? It was closing when you left?

A Yes.

Q Do you have any idea what time that would be?

A I think about 2:00.

Q About 2:00 or 2:30?

A People were still eating.

Q You think it may have been half an hour after you left there?

A Yes.

Q Did he fight back any?

A Yes.

Q Did he hit you with a rock? Did he pick up any rocks?

A He hit Jerry in the nose.

Q He hit Jerry in the nose?

A Yes.

Q As I get it now, the fight started when you got out of the car, and he tried to mess around with you, you say he was a queer, and now you were leaning against [fol. 502] the car at the time, or was he leaning?

A He was leaning against the car.

Q All right.

A And I was in front of him.

Q All right, then, you grabbed him and gave him a shove—no, you hit him first?

A I said "Get away, and leave me alone."

Q I see. Did he approach you again?

A Yes.

Q And this time you hit him in the mouth with your fist?

A Yes.

Q You didn't knock him down?

A No, he just stood there and laughed.

Q Did Jerry come around the car then?

A He was there.

Q He was standing there?

A Yes.

Q Did this guy attempt to fight you off, then?
A Yes.
Q He did?
A Yes.
Q And the two of you threw him over the bank?
A We all went over.
Q Oh, all three of you went over together?
[fol. 503] A It was more or less he had ahold of us.
Q I see. And he hit his head on a rock down there. Did you hit your head on a rock?
A I hit my knee.
Q You did? How about Jerry? Did he get cut up down there?
A I don't know.
Q But you then grabbed a rock. Do you have any idea how many times you hit him?
A I know of twice.
Q You know of twice, maybe more?
A No.
Q Just twice. What part of his head do you think you hit him on?
A I don't know.
Q Did you hit him in the face, or in the head?
A About the head.
Q Do you know how he got this big bump on the back —could that have been from falling over?
A It could have been.
Q He has a lot of marks on his clothes, but you say you didn't choke him?
A No.
Q He was strangled. After awhile he was bleeding quite heavily, wasn't he?
[fol. 504] A Yes.
Q I can appreciate your concern at this point with this deal. I imagine you panicked.
A Yes.
Q This would be true, wouldn't it?
A Yes.
Q Then you decided what, to move him? Did you know that he was dead then?
A No.

Q When you pulled him, what made you decide to pull him to the canyon?

A I don't know, we were scared.

Q Did you figure he was probably dead when you pulled him over there?

A He was faint then, he was alive.

Q How about—you carried the feet, what did Jerry have hold of?

A I don't know.

Q You don't remember that he had the strap around his neck?

A No.

Q It is possible that Jerry put the strap—it was the belt out of his pants—he was dragged, you pulled him feet first over there, head first or feet first?

[fol. 505] A No, the feet.

Q Did you drag him on his back?

A Yes.

Q And the two of you dumped him down in that little ravine. After you did that, where did you go? Did you try to start the car? Did you go through his pockets?

A I didn't,

Q You didn't go through them?

A No.

Q Do you know whether Jerry did or not?

A He couldn't have, because when we left we went up there, Jerry fell down in the ditch there, he got right back up and came out and we wanted to get home. We tried to start the car.

Q Was there a key in the ignition?

A It broke off.

Q Was the key in there? Where did you get the keys?

A He had the keys in his hand all the time.

Q I see.

A And when we went down the hill they fell out of his hand and I had taken them.

Q Where did you find the key when it fell out of his hand?

A There was a bunch of keys.

Q Oh, there were a bunch of keys? And you got the

[fol. 506] bunch of keys?

A Yes, I got them.
Q You had these in your hand while the fight was going on or on the way to the car?
A On the way to the car.
Q You found the keys laying there?
A Yes.
Q And did you try to start the car?
A Yes, Jerry and I both did.
Q And it wouldn't start? You had the wrong key?
A It broke.
Q What did you do from then on?
A Walked up the street.
Q You walked up the street? And where did you go then?
A Gas station.
Q The Shell station on 82nd and Sunnyside?
A Yes.
Q And you washed up there, did you not?
A At the Shell station, yes.
Q In the washroom?
A Yes.
Q Was there anybody around the Shell station when you got there?
A No, I don't think so.
[fol. 507] Q After you washed up, what did you do then?
A Telephoned.
Q From there?
A Yes.
Q From that booth?
A Yes.
Q Who placed the call?
A I don't know, I think I did.
Q Which cab company was it that you called?
A Radio, I think.
Q And how long was it before he came?
A Just a few minutes.
Q About fifteen minutes?
A Yes.
Q Where did he take you?
A 92nd and Woodstock.

Q Do you have any idea what time it was when you got back there?

A No.

Q What did you do when you got out of the cab, you walked up to his place?

A Yes.

Q Now, did you stay there all day?

A All that day?

Q This morning when you got home, what time was [fol. 508] it do you think you got home?

A I haven't any idea. It was pretty late.

Q What did you do with your clothes when you got there?

A We burned them...

Q Where did you burn them, out in the back yard? Did you burn them right away?

A Yes.

Q What was it that you burned? What did you burn?

A My uniform.

Q Which would include what, everything?

A Yes.

Q You burned your pants, your shirt, your scarf and hat, too?

A Yes.

Q Did you burn anything else?

A Jerry burned his sweater.

Q Jerry burned his sweater?

A Yes.

Q What was the color of his sweater, do you remember?

A Green, I think.

Q Did you burn it in an incinerator, or something else, a barrel?

A No.

Q You would have burned that after daylight?

[fol. 509] A It was still dark.

Q It was still dark?

A Yes.

Q Your uniform, of course, wasn't stolen. Did you spend the rest of the day there at your aunt's place?

A I think I went to my girl's house.

Q I see. That is over in St. Johns?
A Yes.
Q That was the day of the funeral.
A I had to go to the funeral that day.
Q You had to go to the funeral?
A Yes.
Q What time was the funeral?
A 2:30
Q Did you go to bed before you went to the funeral?
A Yes.
Q After you burned this clothing, what did you do, take a bath, or what?
A I took a bath.
Q What time did you get up, do you remember?
A About 10:00 o'clock.
Q Time enough to get ready to go to the funeral?
A Yes.
Q Did you have any place to go other than the funeral?
[fol. 510] A I went up there ahead of time.
Q I see. So you could all go together, the whole family went to the funeral?
A Yes.
Q I see. And needless to say, it is a bad thing for you. We have talked about this, if I were to type out a statement as you tell it, similar to this so that we can shorten it, would you be willing to sign the statement? What we would do in the event that this is agreeable with you, is just type it up, condense it from what we have talked about, and then this will be in your words. You can read it, correct any mistakes, so that we know what you have said and not what we would have to say. We are not going to force you to do it. You don't have to do it. It is entirely up to you. It is so much to your benefit, if anybody's, rather than prolonging the agony, because this way you can get in the facts, your knowledge about the guy being a queer and so on and so forth. You can take the stand and you will be able to get in some of these things. It is up to you if you want to do it. You understand we are not pressing you, not pressing you to do anything against your will. You have already

told us all of it. In the event we take the stand, we will testify to what we have talked about here, and if we want [fol. 511] to condense it and put it on paper, you have the right to read it and correct it, and you can sign it if you wish. We would like to do it that way. There is nothing that alters the facts. The only thing is it does give the facts. It doesn't alter the fact that you were there and told us that. It isn't that we are trying to make out that you are guilty of something that you are not. You realize that. You have already told us. We knew that before we came and got you, or we wouldn't have came and got you. We knew who you were, and we told you the same story. You wouldn't object if we did it?

A I don't know.

Q O.K. If you don't object. I don't want to type this out and you say you don't want to. How about a cup of coffee? Could you go for that? Cream and sugar?

A Yes.

Q All I can tell you is that everything is taken into consideration, from this point on you have got to depend on your attorney. You are not going to be railroaded. You are not going to be abused. You are not going to be slapped around and beat around, or anything. You are entitled to all the protection of the law. You will have an attorney. If you can't afford to hire one, the court will appoint you an attorney. You are going to have an [fol. 512] attorney. We want to make this clear to you. You are entitled to an attorney. You are going to have the attorney, whether you pay for it or not. So you have got to put yourself in the hands of your attorney.

Now, there is a chance that you will be arraigned this evening. What they will do is issue the charge and if it is done this evening the judge will immediately appoint you an attorney tonight. When you are arraigned he will immediately appoint you an attorney. Don't feel that you are left all by yourself. You are not.

A I am not no murdered. I don't understand what happened.

Q We can understand how these things happen. They are certainly not condoned by society, that is for darn sure. But I wanted it made very clear to you that you

have this right to an attorney and to know that the things that you say can be used against you in court. I don't want to underemphasize that. I want to emphasize that to you. You have these rights, and nobody can take them away from you. As I said before, we have some spendid attorneys here. If you are not satisfied with the attorney that is appointed, and if you have funds, you can hire an attorney of your own choosing. We have competent attorneys, and the seriousness of this crime, they are going to be sure that you get a good attorney, because it [fol. 513] is not their idea to get you an attorney that is not competent, because this is a grave crime. You are going to be appointed a good attorney so far as that is concerned. I wish you would just rest easy on that point. I know that you can't rest easy over what has happened. You are a normal boy, a young man, I should say, and you know what grave consequences can come out of this. It is just too bad these things happen, but they do. I feel sorry for you and your family. It is not good.

MR. FRAZIER: Do they have Jerry in Portland?

Q I can't tell you where Jerry is. It is not in my hands.

Did he say anything about selling his '50 Chevrolet to you?

A No.

Q This Oldsmobile—from the time that you first met him, did he have this Olds?

A Yes.

Q Part of this mystery has been that when he left, he worked, maybe he told his boss, and he left there about 9:00 or 9:30 that night with the Chevrolet, greyish white.

A He told me he just bought this.

Q That is what I was wondering about. Did he state [fol. 514] where he bought it?

A No.

Q We can't find the Chevrolet. We dont' know what happened to the Chevrolet, but he said he just bought it that night?

A Yes.

Q We suspected he bought it because his property is in the car, and there is no reason why all of his property

would be there if he didn't own it. Did he do much drinking?

A Yes.

Q We understood that he did quite a bit of drinking. When you first met him, you say he picked you up. Were you in a tavern or on the street?

A On the street.

Q Did he tell you where he was going, or did he ask you where you were going? What was the conversation that you got into with him?

A We were going around drinking.

Q Did he ask you to go with him?

A He asked us to go with him.

Q And that is how this whole thing started?

A Yes.

Q Did you visit other taverns before you came down to the Harmony?

[fol. 515] A Spot 79.

Q The Spot 79?

A Yes.

Q We know you didn't do any drinking at the Harmony, I believe that you had one drink, did you not?

A Yes.

Q And—

A And I had a coke and hamburger.

Q As a matter of fact, you put a drink in your pocket and wanted to take it with you, and she objected to that and he also said that, and she also said that you went back to the car—you said you were going to go someplace to see a girl, this Linda Bradford. Where were you fellows going when you left? Shortly you came back. Where did you go in the interim?

A When we saw a State Police, he said, "I better get out of here", so we went back.

Q I see. That is why you were out such a short time?

A Yes.

Q So you went back to the Harmony, then?

A Yes.

Q Now, you didn't drink any more that night?

A No.

Q You had a hamburger and a coke?

A That is right.

[fol. 516] Q So we know that you were pretty well in control of your faculties at this time?

A Yes.

Q Do you remember a girl that was in there? Did you have words with her? She sat down—was she a girl that you knew?

A No.

Q Was that a girl that Jerry knew?

A No.

Q Neither one of you had seen her before?

A No.

Q Was she asked for a date, or to go for a ride with you, or something?

A I was just kidding around with her, not about a date.

Q I see. I know Marines, having been one. I know how these things go. In any event, she sat down in the booth with the other guy?

A I am not sure of that.

Q Now, when you paid for your hamburger and coke, were you the last one to pay, do you remember that?

A I was the last one to eat, yes.

Q You were the last one to pay?

A There were two girls came in. They were in front of me.

[fol. 517] Q Could you tell me what time she was closing the place up?

A She said about five or ten minutes.

Q That she would be closing?

A I think so. These girls came in and asked if it was too late to eat, and she said, "No," she set them down in a booth.

Q Is there anything along the line, now, that we haven't discussed?

A I don't believe so.

Q You directed him to turn off of 82nd where you wanted to go, I suppose?

A Yes.

Q Did you direct him to go up Sunnyside Road?

A Yes.

Q Did you direct him to turn right on 86th?
A I wanted to go up another block. I was trying to find my girl friend, and we came back another block.
Q You don't know yet where the house was on the other road or not?
A No, I don't.
Q And that is when you drove down across? Now, actually, your car ran into a dead end, didn't it?
A I believe so, yes.
Q Did you pull into a driveway in the yard and back out?
[fol. 518] A I think so.
Q That is when you asked him to stop the car?
A Yes.
Q And the reason for stopping was you wanted to get out?
A Yes.
Q Did you tell him you wanted to get out?
A Yes.
Q What was his reply to that?
A He asked me why I was getting out.
Q And what did you reply?
A I told him I wanted to see my girl friend.
Q He had this whole mess of keys in his hands. He took those out?
A Yes.
Q He probably was afraid that you were going to take the car, don't you suppose?
A I don't know.
Q Now, Jerry got out?
A Yes.
Q He got out on the right?
A Yes.
Q What did you call this other fellow?
A I can't remember.
Q Did you call him Rusty, Russell?
[fol. 519] A No.
Q You didn't call him anything?
A He told us a name, a funny nickname, I don't know it.
Q Rusty?

A Something on that order, yes.
Q You slid out. Did you tell him to get out?
A No.
Q Well, normally, if you are going to get out of a car, you get out on the right?
A Yes, and I did that, I slid out on the right.
Q How did you happen to go around to the other side?
A He asked me where I was going, and I told him I was going to my girl friend's.
Q The girl is here now, and we will have her take it down in shorthand and she can retype it later. As a matter of fact, she could come in and take it right here, these words, and it will all be done in one motion.
A Right."

* * * *

[fol. 527]

[Cross Examination of Officer Olsen]

Q (By Mr. Goodwin) In other words, does the tape contain all of the warning and advice that he got concerning his constitutional rights prior to the time that he signed the statement which is Exhibit 67?
A That is right, all of it.
Q And you don't claim that you or any other officer told him that he had an affirmative right to remain silent, other than simply your statement early in the tape, "If you want an attorney you can have one, and what you say here could be used against you."?
A That is correct.

* * * *

[fol. 557]

[Court's Ruling on Admissibility of Confession]

THE COURT: I don't know whether I can express myself so that everybody will understand, and it is doubtful that any judge can, because even with all of the cases that have been written on this particular type of situation so far, there have been thousands of pages from the States of California, Washington, Oregon, the Supreme Court of the United States, and even after all of these learned people have expressed themselves, it is difficult to

understand exactly what they say and what they mean.

I think, however, that from these decisions that there are three rules which they have put forth. First, they have said that the defendant has to be informed of his right to remain silent, and this doesn't mean that you [fol. 558] have to say, "You can remain silent." Other words might be used. He has to be informed of his right to an attorney. And also, our Court has particularly gone ahead and said that the Court must determine whether or not the admission or confession was voluntary. And, of course, as you well recognize, this puts the Court in a rather difficult position.

Now, all of the cases which have been cited to me, and I can't say that I have read every case, or that I have read every one with great thoroughness, because I haven't had the time. But the factual situation in each one of the cases where there has been reversal is different, and they are all different in this case. In almost every one of the cases which I have read, there has been some fact which would indicate some area of trickery, where there has been some real unfairness on the part of the police, something where they have gone beyond what justice would expect of police officers. The Jackson case, for example, the man was under the influence of drugs at the time that he made this statement, in fact, he was ready to go into the operating room for an extremely serious operation.

The Neely case, itself, the facts brought out are that the defendant testified that the police officers told him that he was there to talk about a situation, that they wouldn't prosecute him, it was merely concerning a divorce proceeding. Apparently, I don't know whether this was re- [fol. 559] butted, but apparently it wasn't, it would have been so stated in the record.

In this case there is no claim, as far as I can see, that the defendant was misused by the police officers, that they used any form of brutality, that they threatened him. Certainly they attempted to persuade him, and I would assume in any case where a police officer would talk to a defendant that they would naturally try to persuade him. Mr. Goodwin, you brought up the question of fairness. I

don't know exactly what you mean by this, or what the Court means by this. I can only tell you what I think it is. I think we have fairness to the defendant. We have fairness to the State. And I think the Court has to consider both sides.

In this case there is the defendant, and the tape indicates this, that he was informed that anything he might say could be used against him, that he was entitled to the aid of an attorney. The testimony indicates by the defendant himself that he is twenty years old. He stated that he read this statement, that he signed it. There is no indication that he is of low mentality, and also the fact that he has had ten years, at least ten years of public school education. There is no evidence on his part that he did not understand what he was signing. As I say, and I mean this with all sincerity, I may be wrong. I may be wrong, I may be misinterpreting what has been said [fol. 560] by the Supreme Court decisions. However, I can only go by what I think they mean and what my observations have been in this case, and it is my opinion that this statement was given voluntarily by the defendant, and that he was informed of his constitutional rights, those being the right to remain silent, and that he was entitled to the aid of an attorney. As far as the voluntariness is concerned, I find that it was such beyond a reasonable doubt. We will have a short recess and resume the case.

* * * *

[fol. 574]

[Examination of Co-Indictee Rawls]

IN OPEN COURT IN THE PRESENCE OF THE JURY

THE COURT: Call your next witness.
MR. ROOK: I will call Jerry Lee Rawls.
THE COURT: Take the stand, please.

[fol. 575] JERRY LEE RAWLS was thereupon called as a witness in behalf of the State, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROOK:

Q Would you state your name, please?
A Jerry Lee Rawls.
Q And where do you live?
A I am in custody of the Clackamas County Jail.
Q Are you acquainted with the defendant in this case, Martin Frazier?

MR. JACOBS: Could the record show that I am Jerry Lee Rawls' attorney, and I would like to confer with him on these questions.

THE COURT: If you want to stand alongside of him it is fine, Mr. Jacobs.

MR. JACOBS: Go ahead and answer.

Q (By Mr. Rook) Are you acquainted with Martin Frazier?
A Yes, I am.
Q Were you with him on the evening of September 21st and the morning of September 22nd, 1964?
A I refuse to answer on the grounds that it may tend to incriminate me.
Q Mr. Rawls, are you invoking the privilege of the Fifth Amendment because you personally desire to in-
[fol. 576] voke it, or because someone has told you to?

MR. JACOBS: If I have the right I would object to that as not a proper question.

THE COURT: I will sustain the objection.

Q (By Mr. Rook) Mr. Rawls, are you invoking the privilege as to the questions that I asked of you of your own personal choice and your own personal desire?

MR. JACOBS: Again, the same objection.

MR. ROOK: I am entitled to know whether or not the privilege can be invoked.

THE COURT: I will sustain the objection.

Q (By Mr. Rook) You know Mr. Rawls, you don't have to take the Fifth Amendment if you don't want to.

MR. JACOBS: Again, this is objectionable.

MR. ROOK: If he didn't understand it, it could be coercion. If he understands and wants to take it, he can. If he didn't—

THE COURT: I think that the record shows that he has an attorney representing him. Throughout whatever proceedings that have transpired his attorney is here, and I am sure his attorney has consulted with him, and I would sustain the objection.

Q (By Mr. Rook) Where were you on the night of September 21, 1964?

MR. JACOBS: The same answer.

[fol. 577] A I refuse to answer on the grounds that it may tend to incriminate me.

Q (By Mr. Rook) Is it your intention, Mr. Rawls, to give the same answer to any questions that I may ask about the events, that I may ask about that night and the early morning of September 22?

A I refuse to answer on the grounds that it might tend to incriminate me.

MR. JACOBS: May I confer? (To witness) Your answer to this question should be Yes.

THE WITNESS: Yes, it is.

MR. ROOK: I have no further questions of this witness.

MR. GOODWIN: No questions.

THE COURT: You may step down.

(Witness excused)

* * * * *

[Motion for Mistrial]

IN CHAMBERS OUT OF THE PRESENCE OF THE JURY

MR. GOODWIN: Your Honor, Mr. Jacobs is here, and Mr. Jacobs tells me that he informed the District Attorney before the trial that Mr. Rawls would take the Fifth Amendment if we called him. I want at this time, and [fol. 578] Mr. Jacobs could be put under oath and questioned if it is necessary—

THE COURT: For what reason?

MR. GOODWIN: The Court may recall that before the opening statements were had in this case I advised the District Attorney in the presence of the Court and the

Court in the presence of the District Attorney that such was my information and that any reference to what Mr. Rawls would testify or any reference to Mr. Rawls' confession or anything of Mr. Rawls would be error as to this defendant, and prejudicial error and I claim that as grounds for a mistrial. I renew the motion for a mistrial at this time. I cite the case of State vs Slim & Wolfe, 141 Or. 174, which clearly establishes the law in Oregon that the confession of the co-defendant is inadmissible and is reversible error if admitted as evidence against this defendant.

THE COURT: Are you claiming that there may be an attempt to get the confession of the co-indictee in evidence?

MR. GOODWIN: Yes. The District Attorney held it in his hands and referred to it and read from it in his opening statement over objection at a time after he had been warned that we understood that Mr. Rawls was not going to testify, and he knows that the confession was pure hearsay as to our defendant, would not be admissible under any jurisdiction.

[fol. 579] THE COURT: It is true it is not admissible.

(Mr. Dale Jacobs was thereupon sworn in by the Court.)

Q (By Mr. Rook) When and where did you advise me that Rawls was going to take the Fifth Amendment?

A I did not advise you.

Q Did you tell someone from my office?

A Yes.

Q Who was that?

A I believe it was last Thursday or Friday, Durwood Thomas of your office, at least he told me that Mr. Rook had sent him down to make sure I had transportation to the hill so that I could find out from Jerry Lee Rawls whether or not he wished to testify in this case. I went up and talked with him and he said he would not testify in this case. I advised Mr. Thomas and said to him, "If you want to talk to him to verify this you are certainly welcome to do it, but he will not, he tells me, he will not testify." And then on one later occasion, I had an in-

formal conversation with Jim Carskadon of your office, where we discussed the fact that he was not going to testify.

Q Wouldn't you say it was more accurate that the purpose for which you were contacted was that we could have permission to talk to Mr. Rawls, that I had asked you on a number of occasions, and other persons have also [fol. 580] contacted you, and I think you said that you hadn't had a chance to talk to him yet. And the next day I sent Durwood to give you transportation because we wanted permission to talk to him.

A Yes, that is right.

(Mr. Roger Rook was thereupon sworn in by the Court.)

MR. ROOK: In regard to the knowledge that I had, Durwood Thomas told me of the conversation with Mr. Jacobs to the effect that Mr. Jacobs advised him to take the Fifth Amendment. I had no conversation that I recall with Mr. Carskadon concerning this. I also was told by Mr. Goodwin that he understood that Mr. Rawls was going to take the Fifth Amendment. After Mr. Jacobs' conference I did have a Lieutenant Thomas of the sheriff's office talk to Mr. Rawls after we obtained permission from Mr. Jacobs. Thomas reported to me that he felt sure that Mr. Rawls was going to testify. I had contacts from Mr. Orr from the probation office. The information I received from Mr. Orr was that Mr. Rawls was going to testify and did not want to take the Fifth. The report from the sheriff's office, Rawls' two brothers and/or mother, I am not sure of that, at least two of them, or three of them, had talked to him, and advised me that although counsel advised him not to testify, he thought he wanted to testify and he was going to testify, he planned to testify even though advised by his attorney [fol. 581] that he shouldn't. I then proceeded in the belief that the information I had was accurate and I am not entirely sure that it isn't still accurate. If I had gone further in the question if he really wanted to determine to take the Fifth—this is my basis for making this state-

ment that I originally made and I wanted it in the record under oath under those circumstances.

MR. JACOBS: I want to say unequivocally that I did not tell Durwood Thomas that I had advised this defendant to take the Fifth.

THE COURT: What was that?

MR. JACOBS: I did not tell Durwood Thomas that I advised him to take the Fifth Amendment. Now, Mr. Rook says that Durwood told him that I advised him to take the Fifth. This is not true. Also, I would unequivocally say that at no time did I advise him not to testify in this case. We discussed it. I would have been a silly person to make such a decision. This is the decision he made himself. What he may have told these other people is something that I don't know, but Durwood Thomas will have to admit I asked him at the jail, "All right, Durwood, you talk to him. This is what he tells me. This is his own decision."

MR. ROOK: I am talking about the information I had in my head at the time that these events occurred. I don't know the facts. I testified as to the information I had in my head when I made the decision that I made. [fol. 582] MR. JACOBS: I at no time made this decision for him.

MR. GOODWIN: It is a pity that this District Attorney has mentioned before this jury all sorts of questionable matter about which he had been warned.

THE COURT: Wait a moment. If you have some specific motion you make it.

MR. GOODWIN: I am arguing my motion for a mistrial.

THE COURT: O.K.—on the grounds that he shouldn't have called Mr. Rawls?

MR. GOODWIN: On the grounds that he should not have referred to Mr. Rawls' testimony and Rawls' statement in the opening statement.

THE COURT: He said that he intended to call Mr. Rawls.

MR. GOODWIN: He stood in front of the jury and referred to his confession and acted as if he were reading from it. When I objected he said, "This is what he said,

to this effect," and he indicated to the jury that they had this confession from Mr. Rawls, which is clearly inadmissible under any circumstances, whether Rawls is called or not.

MR. ROOK: I never indicated that this is what Mr. Rawls will testify to.

THE COURT: I don't know that he was reading. I didn't know what he had in his hand, unless you were closer than I, I couldn't tell what it was.

MR. GOODWIN: I think you will admit that he had [fol. 583] Rawls' statement.

MR. ROOK: I won't admit I was reading from it.

THE COURT: Do you have anything further that you want to say?

MR. GOODWIN: No. I think the point is quite clear.

MR. ROOK: No, your Honor.

THE COURT: The law is clear that the co-indictee may be called to testify once his case has been disposed of. It is my understanding—I don't think there is any evidence on this particular point, but there have been statements made by counsel that Rawls pleaded guilty to a charge of second degree murder. The law would allow him to be called. There is no reason why he couldn't be called. However, he does have a right to take the Fifth Amendment if he so desires. This is an action which he has to make himself. Until such time as he, under oath, says that he is going to take the Fifth Amendment, I don't think that we can assume that he is going to do that. I will deny your motion.

MR. GOODWIN: Your Honor, our Supreme Court and the United States Supreme Court repeatedly said you can't unring a bell from prejudicial terms such as this that has deliberately been brought before the jury. I am saying that this—

THE COURT: All right, say that the District Attorney says in his opening statement, "I am going to call Officer Joe Blow, and he is going to say such and such, [fol. 584] and I intend to prove such and such by his testimony." And Joe Blow gets to the stand and surprises the District Attorney, and he doesn't say this particular thing. Is that grounds for mistrial?

MR. GOODWIN: Not necessarily. In this case the District Attorney referred to the confession of the co-defendant, which wouldn't be admissible under any circumstances.

MR. ROOK: I didn't say anything about the way we expected Rawls to testify.

THE COURT: It is true that a confession of a co-indictee is not admissible in evidence.

MR. GOODWIN: I claim this is the Fourth Amendment right of any client.

THE COURT: What is that?

MR. GOODWIN: Due process of law.

THE COURT: I have ruled.

* * * *

[fol. 647] [Frazier's Written Statement]

Q And what is this State's Exhibit 66, Detective Olsen?

A It is a statement given by Martin Frazier on September 24, concerning this alleged crime.

MR. ROOK: I will offer State's Exhibit 66 into evidence.

THE COURT: Submit it to counsel.

MR. GOODWIN: Your Honor, we have made our objections for the record outside of the presence of the jury. We would like to preserve it.

THE COURT: The record shows your objection to that particular document. The objection will be overruled, and State's Exhibit 66 will be received in evidence.

* * * *

MR. ROOK: I would ask that Detective Olsen read the statement in its entirety.

* * * *

[fol. 648] THE WITNESS: Under the name Martin Rene Frazier, his age 20, home address 9736 Woodstock Court, Portland, Oregon. The date is 9-24-64, time, 6:15 P.M. Statement made at the sheriff's office, Oregon City, Clackams County, Oregon.

"I, Martin Rene Frazier, say that I have been told that the persons to whom I make this statement are Detectives Rotrock and Louis Olsen. I make the following statement of my own free will without fear, threats of coercion, and promises of reward or immunity of any kind. I know I am not required to make any statement, and I know that any statement I make may be used against me in criminal proceedings in court.

"The following facts are true to the best of my knowledge. I flew from El Toro Marine Base to Portland, Oregon, arriving here the 17th of September. I was picked up at the airport by my two cousins, and they took me to my aunt's house and my aunt is Fern Robertson. She lives at 9736 Woodstock Court. On Monday night about 8:00 we went up to Scotty's Tavern on 92nd and Woodstock. Jerry and I sat there and had a few drinks. Then Jerry and I went across the street to Conlee's Tavern and we stayed there awhile and had a few drinks. Then we caught a cab and went to Spot 79 on Foster. We [fol. 649] drank there awhile and we came out and was walking down the street and this man stopped and picked us up. He was in an Olds. We got in and went down Foster. We turned down 82nd and went to the Harmony Inn, arriving there about 1:00. There was a car next to us and he took a green woman's coat out of it and put it in his car, and then we went inside and had a drink. We were there for about twenty minutes, and I asked him if he would take me to see this girl, Linda Bradford, so we left and went down there and he started to turn off on Sunnyside Road, and he saw a state police, so instead, he wanted to go back, because they were after him, or something like that, so we went back to the Harmony Inn. He got a drink and I got a coke and a hamburger and sat there and ate. And he drank pretty heavily while we were there. Jerry had one drink. Then we left there about 2:30 to try to find Linda Bradford's house, and we went down a few streets and I wasn't sure where it was at. I directed him to these streets, we went down to the end of 86th Street, and I asked him to stop the car, because I wanted to walk up to Linda's house and try to find it. We all got out of the car. He took the

keys out. He got out on the left side and Jerry and I got out on the right side, walked around the front of the [fol. 650] car, and he asked me to come over. He made a pass at me. He tried to unzip my pants. I shoved him away against the car and he came toward me again. And I hit him in the mouth with my fist, and all he did was laugh. Jerry was standing beside me, so he came at us and we started to fight, and all three of us went down the side of the hill and fell. He was laughing then. He was so much bigger than I was I picked up a rock and hit him in the head. I hit him twice. Jerry was on his knees and he hit Jerry with something in the nose. Jerry hit him with his fists several times. The fight lasted about five to seven minutes, or something like that. We were scared, so we pulled him off into a ditch. Jerry was in front pulling him and I had ahold of his feet, walking behind. We dumped him in the ditch and Jerry fell down in the ditch with him. So Jerry climbed back out of the ditch and we went up to—we went up to where we were fighting and I found the car keys and I tried to start the car and it was the wrong key. I broke the key off in the lock and then Jerry and I went up to the Shell station at 82nd and we went into the washroom and washed up, and then we called the Radio Cab from the phone booth by the Shell station on 82nd. We waited about fifteen [fol. 651] minutes for the cab. When the cab arrived we took it to 92nd and Woodstock. We paid the fare, which was $2.00, and we walked to Jerry's house, it was still dark when we got there. We went in the back yard and started a fire in a barrel and burned the clothes we were wearing. I was wearing a Marine uniform. We went and cleaned up and went to bed. We got up about 10:00 the same morning, then at 2:30 I went to my mother's funeral.

I hereby certify that I have been advised of my constitutional rights by the officers and waived my rights to have counsel present when the officers questioned me. No threats or promises were made to me in obtaining my statement. I have carefully read this page and any foregoing pages of this statement and have initialed each and every page thereof and have had an opportunity to

make corrections thereon. The statements made herein are true to the best of my knowledge." That is signed Martin R. Frazier, dated, September 24, 1964, page 1 of one page. Witnessed, signed, Louis C. Olsen and signed Bill Rotrock.

* * * *

[fol. 733]

[Motion for Mistrial and Ruling on Motion]

[In Chambers out of the Presence of the Jury]

MR. GOODWIN: Now, your Honor, the State having rested, we want at this time to renew our motion for a mistrial on the grounds, first, that the State has committed prejudicial error in its reference to the statement and testimony, that is the confession of the co-defendant, Jerry Lee Rawls, about which there has been no testimony. It was poison, and it was injected deliberately into the trial at a time when the State knew that Jerry Lee Rawls might take the Fifth Amendment. I would like to renew the motion for a mistrial, also, on the basis of the constitutional rights of the defendant Frazier having been violated, and the taking of his duffel bag and its contents without due process of law, and without his consent, and not incident to his arrest, but several hours thereafter, and at a time when the police had ample time for search warrants without invading his right of privacy, under the Fourth Admendment, and Section 59 of Article I of the Oregon Constitution, and further on the basis of the claimed error of admitting the confession, Exhibit 66, into evidence, which was presumed to be inadmissible, and which was referred to copiously by the District Attorney in his opening statement, and which, of course, was finally received in evidence, although the record shows that the defendant had not been advised affirmatively and effectively of his right to remain silent, and although the defendant had not been appropriately advised as to at what stage of proceedings he was entitled to counsel. He [fol. 734] had been advised that he would be entitled to counsel, but in the framework of reference to a trial, and at a time when the defendant indicated that he didn't

want to tell the officers any more until he had a chance to talk to a lawyer, and it was shown by the tape recorded interrogation.

THE COURT: Are those your mistrial motions?

MR. GOODWIN: That is our mistrial motion.

THE COURT: Mr. Rook, do you have anything you wish to say for the record?

MR. ROOK: Nothing, except that I disagree with Mr. Goodwin's analysis of what the record shows. I think the record speaks for itself.

THE COURT: So that the record will show—it has not been the thinking of the Court,—I will take it item by item. First, as to a mistrial because of reference by the District Attorney to any statement made by Mr. Rawls. I checked the record, and the District Attorney did not specifically state that he had a statement from Mr. Rawls. He merely stated that he intended to call Mr. Rawls as a witness in this case, and that he would testify substantially according as follows, but not quoting exactly what he said. And the law is that the State has the right to call a co-indictee. There is no reason why they can't call one.

Also, there was no motion for a mistrial to that particular point made until after the defendant Rawls had [fol. 735] been called and took the Fifth Amendment. The motion is denied on that particular ground.

Second—

MR. GOODWIN: Your Honor doesn't claim we waived the mistrial?

THE COURT: I didn't say that you waived it. I said you didn't make a motion until that point. There has been no evidence in this case that the defendant Rawls made a statement. The evidence is that he pleaded guilty to a charge of second degree murder. There is something else I wanted to add to that point, anyway. As to the second point, the Court is of the opinion that the duffel bak, or B-4 bag, whatever you want to call it, which contained certain exhibits which have been received in evidence, was not taken in violation of the defendant's constitutional rights. The evidence clearly showed that it was in the possession of a third party, and that the offi-

cers received permission from these parties. In fact, it is my understanding that without the necessity of making any search, thhs matter of this duffel bag was turned over to them.

MR. GOODWIN: May I point out—I want the record to be perfectly clear—what we are complaining about is not the taking of the bag particularly. We are complaining about the taking of the defendant's property from the bag, the opening of the bag, in other words, after the bag [fol. 736] was secured by the officers and in possession of the officers.

THE COURT: I understand that.

MR. GOODWIN: And the taking of the defendant's property out of the bag.

THE COURT: I understand it is your position, Mr. Goodwin, under the law of the State of Oregon and the Constitution of the United States, it would have been necessary that they first secure a warrant before they could have examined the contents of the bag.

MR. GOODWIN: We have phoned New York for the case of People v. Pugach, which was decided on November 3rd, which involved the opening of a brief case—unless it came in this morning's mail.

THE COURT: Why not call the office and see if it came in.

MR. GOODWIN: We haven't received that opinion.

THE COURT: I am ready to rule on that particular point without reference to that case. I don't think that this is what the law intends, and I think that no violation of the defendant's constitutional rights occurred. As to item number 3, the admission of the defendant's statement in evidence, I think that this matter has been carefully reviewed by the courts, and as I stated originally, an examination of the cases which have been cited to the Court, or have been made by the Court, and again I would [fol. 737] like to point out that in each one of those cases where a search occurred, there appeared to be some trickery, fraud, collusion on the part of the State, which the Court did not find in this instance. The Court listened to the tape and the defendant, according to the tape, was informed that he had the right to counsel, and he wasn't

informed in words specifically that he had the right to remain silent, but, words to the effect that anything that he said might be used against him. It was not my impression from listening to the tape that the defendant asked for counsel at any time. He merely stated—and I agree that this is subject to interpretation, depending on how you listen to the tapes—it was my interpretation that he said "Gosh, maybe I need a lawyer, I am in plenty of trouble," without any request for an attorney, plus the fact that the statement which had been signed by the defendant recites a recitation that he understood fully his constitutional right to remain silent, and that he knew that anything he might say could be used against him; a further recitation concerning a right to an attorney during the time that the statement was had, plus the fact that there was no evidence introduced on the part of the defendant that he was threatened, or he was coerced into making this statement, that he was not ill. The statement was taken within a few hours of the time that he —for the sake of the record, I will say, was in the custody of the police officer, plus the fact that the defendant is [fol. 738] twenty years of age.

There is no testimony that he was unable to read or understand the statement which he signed, that he is a member—I think the Court can take judicial knowledge of the fact that he is a member of the Marine Corps, has been in the Service for several years, and has had some experience as a man of the world. And for that reason, and my interpretation of the Supreme Court reports, I feel as though Exhibit Number 66 is admissible. However, of course, the defendant has, under the law of Oregon—I think it is State v. Barker—I am not sure as to that particular decision—has the right to offer evidence to show the statement was taken involuntarily, and of course that question will be submitted to the jury for their determination, first as to its voluntariness and as to the determination of the truth of the statement; and it must be considered by them as being voluntarily given beyond a reasonable doubt before they can receive such evidence for their consideration. So I will deny your motion.

MR. GOODWIN: We do claim that he was tricked into it, one, that he was advised that the co-defendant had confessed when the co-defendant was, in fact, still at large, and two, that he was advised that the officers would be able to use his own interrogation as evidence whether he signed the statement or not, so it didn't make any difference whether he signed the statement. * * *

* * * *

[fol. 790] [Direct Examination of Frazier]

Q [By Mr. Anicker] When he [Marleau] came at you and said, "Come on," what did he do?

A He started reaching for me.

Q Where did he reach for you?

A Down by my legs. He didn't actually touch me, I knew what he was thinking. I just shoved him away.

Q And then what?

A He thought that was real funny. He started laughing some more. He came at me again, and I hit him.

Q What did you hit him with?

[fol. 791] A My fists.

Q Where did you hit him?

A Somewhere on the lip, I believe.

Q After you hit him, what did he do?

A Nothing, stood there, laughed.

Q You didn't knock him down, or anything?

A Didn't phase him a bit.

Q You say he continued to laugh?

A There was a sort of a smirky laugh.

Q And then what happened?

A Then we were—I don't know—it seemed like then Jerry came over and told me to leave him alone, or something like that, the next thing I knew we were all rolling down that hill.

Q You don't know who grabbed who, or what happened?

A No.

Q When you got to the bottom of the hill, where were you, in what position?

A On the way down there is a wire fence there, and I caught my knee on that. We went down and I was face

down with my face in the dirt, or the grass, or whatever it was, and he had hold of the back of my neck.

Q Who is "he"?

A Russell Marleau. I don't know where Jerry was or what he was doing.

[fol. 792] Q What did you do then?

A Well, I was trying to get loose from him, in the position he has me I was sprawled out flat and I couldn't move.

Q What about his strength, how did it compare to yours?

A He was a better man than I was.

Q How much do you weigh?

A Now?

Q Yes.

A I don't know.

Q How much did you weigh at that time?

A About a hundred forty, a hundred forty-five.

Q And he was—by "better man than you", you mean he was stronger than you?

A Yes, sir.

Q And you had your face down—then what did you do?

A I couldn't get loose by moving or struggling so—

Q Did you get turned over?

A I was just flat on my stomach and face down. I guess there was a pile of rocks, a bed of rocks. I picked one up and I hit him with it, I don't know if once or twice, and he let go.

Q Where did you hit him, as far as you know?

A The back of the neck or the back of the head.

Q Do you know whether that knocked him out or had any effect on him?

[fol. 793] A No, it didn't knock him out.

Q What happened then—you hit him and he let go of you?

A He let go of me and I pushed myself up and I was on my knees. I don't know if it was the fact that the blood was rushing to my head, or what, I got real dizzy. I was trying to get my bearings and I heard him and Jerry scuffling around. I don't know. I can't explain it,

just like I was trying to find myself and I couldn't, and the next thing I know Jerry was on top of him.

Q Did you say anything to Jerry?

A I saw what he was doing and I told him to leave him alone, he wasn't going to bother us any more, to get out of there.

Q And then what happened? Did Jerry answer you?

A I don't know. He said something, I am not sure what it was.

Q And then?

A I don't know—it is like—I didn't black out, I mean I could tell there were movements, but I don't know—it is like a dark room, turning a light bulb on and off, that is all I can see it. The next thing Jerry asked me to help him and it was all over.

Q What help did you give him, then?

A He grabbed the front of him and I took the rear of him and drug him over there to the gully, what they [fol. 794] got, and Jerry fell down in that pit with him.

Q What did you do when Jerry fell in there?

A I took off up toward the car.

Q How long was Jerry down there?

A Sixty seconds, two minutes, something like that.

Q How long did the fight last, as long as you can recall, or as far as you can recall?

A Five, ten, I can't be sure, I really can't.

* * * *

[Direct Examination of Dr. Shanklin]

[fol. 853] [DR. SHANKLIN:] * * * With me he [Frazier] was extremely cooperative, very passive, very soft-spoken, and I felt that this generally had been his defense toward people all along, that he had been a leaf blowing in the wind, that the aggressiveness perhaps far underneath the hostility, if you will, was never available to him as a defense, except when he was pushed right to the limit. And then he could erupt and all of these feelings of resentment, bitterness, rejection, could well out. But mostly his daily defense was one of complete passivity—"Do with me what you will." And this is pretty

well born out in his Marine service, with the exception of the once, or possibly two, transgressions.

* * * * *

[fol. 854] [DR. SHANKLIN:] * * * The first thing he tends to do if there is any failure on his part or any blame were the act [sic], is to blame himself. This we call intropunitive, turning the blame within, and this word appears in my notes. This is certainly an intro-[fol. 855] punitive man, "I deserve everything that is coming to me." That sort of thing. This is what was preached to him. This was his way of life; that if you make any mistakes, it is your fault, you are to blame, so this is the thing he uses day to day. But it isn't a very useful one to use in every circumstance. It isn't humility by any means, so there is another one that you just barely catch sight of, and this is a feeling that he has been caught in circumstances that are too vast and too huge for him to comprehend or to fight against, and he projects, "If I do wrong, it is really somebody else's fault, some influence, I can't help myself." And this element of projection, saying that the influence is outside of me that causes me to do these things, this is somewhat what we call paranoid suspicion.

* * * * *

[Direct Examination of Dr. Lezak]

[fol. 925] [DR. LEZAK:] * * * His [Frazier] emotional status may be characterized as extremely immature. His understanding of himself and his relationships are quite childish, and he has not developed adequate or integrated techniques for behavorial control. Under normal conditions of stress and tension he is a conscientious conformist, rather shy and acceptant of discipline and [fol. 926] direction. * * *

* * * * *

[fol. 995] [Instructions of the Court]

[THE COURT:] * * * If any counsel intimated by any of his questions that certain hinted facts were, or were not true, you must disregard any such intimation,

and must not draw any inference from it. You must not regard any statement made by counsel in your presence during the proceedings concerning the facts of this case as evidence.

* * * *

[fol. 1010] The law forbids you to consider a written statement in determining the guilt or innocence of the defendant unless you find beyond a reasonable doubt that such written statement was made freely and voluntarily by the defendant and not under the influence of fear produced by threats or by reason of promises or representations made to the defendant. You are instructed that [fol. 1011] you have the duty to first resolve this matter as a question of fact. It will be determined by you without regard to the truth or falsity of the written statement, Exhibit No. 66.

If you determine that the written statement was made freely and voluntarily and not as the result of fear produced by threats or coercion, you will then determine the truth or falsity of the written statement. In determining the weight or probativeness you will give the written statement as to its truth or falsity, you should consider all of the circumstances existing before and at the time the written statement was made as shown by the evidence. That is, but not exclusively, whether or not the defendant was informed of his constitutional rights, including the right to remain silent and his right to the aid of counsel during the interrogation by the officers, or any other circumstances disclosed by the evidence.

You are instructed that a statement which admits guilt is prima facie involuntary and imposes the burden of the State of showing beyond a reasonable doubt that it was not the result of force or improper coercion and that it was made voluntarily.

* * * *

EXHIBIT 5

IN THE SUPREME COURT
OF THE STATE OF OREGON

[Caption omitted]

APPELLANT'S REPLY BRIEF

* * * *

[7]

APPENDIX A

CONFESSION OF JERRY LEE RAWLS

Just prior to 9:00 P.M., September 21, 1964, my cousin Marty and myself left my home on Woodstock Court and walked to Scotty's Tavern on S.E. 92nd. We were at the tavern long enough to drink one glass of beer each. We went from the tavern to the Cascade Funeral Parlor to see Marty's mother. We were at the funeral home for half an hour. From there, we went back to Scotty's Tavern. We were there half and hour or 45 minutes. Marty called a cab and we went to another tavern between 79th and 82nd Avenue. I don't remember the name of the tavern. We had two or three beers at this tavern, and then we walked on down toward the Spot 79 Club. It was on the way to the 79 Club that we met Russ. He was driving towards us in his car and Marty waved and yelled at him and he pulled over and stopped, but I don't think Marty knew him. He parked the car and we went into the Spot 79 Club to have a drink. They wouldn't serve Marty because of his identification so all three of us left. We left the 79 Club in Russell's vehicle, a light brown 54 or 55 Oldsmobile, and went to the Harmony Inn. We got to the Harmony Inn somewhere around midnight. We stayed there until sometime between 1:00 and 2:00 A.M. During this time, I had three drinks. They were Tom Collins. I saw Marty have one drink and he ate hamburger and French fries. During the time at the Harmony, Russell had four drinks at least. Marty mentioned,

while we were at the Harmony, that he wanted to go see a girl that he used to know. I don't know what her name was or where she lived. We then got into Russ's car and drove south on 82nd. Russ was driving, Marty was sitting in the middle, and I was on the outside. We made a left turn off 82nd onto some road. We took a right then and went approximately two blocks. Russ was driving a little bit too fast and Marty this was the wrong was the wrong (sic) street. Russ drove around that area trying to find the street. During this time, I kept telling Russ to slow down. Russ drove back towards 82nd and made a left turn on another street and kept driving fast. I noticed a sign that said dead end. I told him again to slow that it was a dead end. He slowed down and turned around and that's when I grabbed the keys out of the ignition. Russ got out of the car and came around to my [8] side. I then got out of the car and he was walking towards me and said what right did I have to take the keys out of his car. We argued back and forth then about the keys and then he hit me beside my nose on my cheek, and knocked me back a little ways. Marty then jumped out of the car and Russ said something to Marty. I don't know what it was. Russ then grabbed ah ld of Marty. I walked over to them and told Russ to let go of Marty. He didn't pay any attention to me and I picked up a rock off the ground and hit him in the back of the head. We all three struggled and fell over the bank. When we fell down I kicked him a couple of times in the ribs. I was standing up then and Marty and him were on the ground and I don't know how much fighting was going on at that time. I tripped trying to run up the bank on some wire and fell back down. I could hear Russ gasping but he didn't say a word. I then threw the rock that I using (sic) up behind the car. Marty also threw some up behind the car. We then both started dragging Russ toward a spot in the field that we picked out. He was on his back. I had a hold of him underneath the left armpit and by his trousers. Marty had a hold of the front part of his right side but I don't know what part of his body he had a hold of. We stopped dragging him at the edge of the ditch. We started to drag him in and I slipped and fell.

I climbed back out of the ditch and we left him there. We went back to the car and kicked dirt over the bank onto the blood stains. Marty got into the driver's side of the car and I went around and got in on the passengers side. Marty tried to find the right key for the ignition. He got a key into the ignition but broke it off. We couldn't drive the car then so we got out and walked. We then walked to the Shell Station on 82nd Street. One car passed us while we were walking toward the station. I went into the restroom at the station to wash he blood off me and Marty went over to the phone booth to call a cab. Then I went and stood by the phone booth and Marty went inside and washed up. We waited five or ten minutes and the cab picked us up. I don't know what cab company it was that came for us. The cab then took us from the station to 92nd and Woodstock. We walked from there on home, about 9 blocks. We took all of our clothes off after we got home and Marty put them in his traveling bag, and put it at the foot of the bed. We both went to bed and it was about 5:00 A.M. I hereby certify that I have been advised of my Constitutional Rights by the Officers and waive my rights to have counsel present [9] when the Officers questioned me. No threats or promises were made to me in obtaining my statement of the facts concerning this crime.

I have carefully read this page and any foregoing pages of this statement, and have initialed each and every page thereof, and have had an opportunity to make corrections thereon. The statements made herein are true to the best of my knowledge.

Witnessed LOUIS OLSEN

Witnessed WILLIAM ROTROCK

Signed JERRY LEE RAWLS
Date September 25, 1964

SUPREME COURT OF THE UNITED STATES

No. 529 Misc., October Term, 1968

MARTIN RENE FRAZIER, PETITIONER

v.

H. C. CUPP, Warden

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—October 14, 1968

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 643 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 327079 348

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 643

MARTIN RENE FRAZIER,

Petitioner,

—v.—

H. C. CUPP, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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CITATIONS

CASES:

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Supreme Court of the State of Oregon (Ex. 7, R. 20) affirming petitioner's conviction of second degree murder is reported at 245 Or. 4, 418 P.2d 841 (1966). The opinion of the United States District Court for the District of Oregon (R. 21-27; A. 6-10) granting the writ of habeas corpus is unreported. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 41; A. 13-22) reversing the district court is reported at 388 F.2d 777 (9th Cir. 1968).

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 24, 1968 (R. 42; A. 23). A timely petition for rehearing *en banc* was denied on April 15, 1968 (R. 43; A. 24). The petition for writ of certiorari was filed July 15, 1968 and was granted October 14, 1968. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

1. Whether the prosecution's placing before the jury in its opening statement the confession of a co-indictee constituted a denial of Frazier's constitutional right of confrontation and cross-examination, where the prosecution had reason to believe that the co-indictee might refuse to testify under the Fifth Amendment and the co-indictee did, in fact, refuse to testify.

2. Whether Frazier's confession, given after he had stated, "I think I had better get a lawyer before I talk any more," but his request ignored, was admissible under the test of *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L.Ed. 2d 977 (1964); and whether the confession was involuntarily induced either by a deliberate factual misrepresentation that the co-indictee had given a confession implicating Frazier, or by psychological coercion.

3. Whether the contents of Frazier's duffel bag were admissible against him after having been searched and seized without a warrant or Frazier's consent, but with the "consent" of another person.

Constitutional Provisions Involved

The pertinent provisions of the United States Constitution are:

United States Constitution—Amendment IV:

SEARCHES AND SEIZURES

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution—Amendment V:

CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution—Amendment VI:

JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution—Amendment XIV (§ 1):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement

I. NATURE OF THE PROCEEDINGS

On November 19, 1964, the Grand Jury of Clackamas County, Oregon, indicted Martin Rene Frazier and Jerry Lee Rawls for first degree murder, accusing them of having strangled to death Russell Anton Marleau on Septem-

ber 22, 1964 (Tr. 8-9; A. 28-29).[1] Defendant Frazier was tried on January 26 through February 3, 1965. He was convicted of second degree murder and sentenced to serve 25 years in the Oregon State Penitentiary. The conviction was affirmed by the Oregon Supreme Court on October 12, 1966.

On March 1, 1967, Martin Rene Frazier filed a petition for writ of habeas corpus with the United States District Court for the District of Oregon pursuant to 28 U.S.C. 2241-54 (R. 1, 17; A. 1, 2). The district court granted the writ (R. 28; A. 11), but the court of appeals reversed, directing that the petition for writ of habeas corpus be dismissed (R. 42; A. 23).

II. Background of the Murder Trial

At the time of the crime, Martin Rene Frazier was a 20-year old Marine home on emergency leave for his mother's funeral. Between the time when Martin was eight years old and the time when he joined the Marines, Martin and his mother had lived alone. During this period, his mother was an invalid, living on welfare. Martin would work summers, giving most of the money he earned to his mother. Thus, they were very close, although his mother was often critical of him while she was under medication (Tr. 770-74).

Martin dropped out of school and joined the Marines when he was 17 (Tr. 774). Prior to the present conviction,

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[1] The six-volume transcript of Frazier's trial is Exhibit 2 (R. 18, 20; A. 27, 3, 5) of this proceeding. For convenience, this transcript will be cited herein as "Tr.," with parallel citations to the Single Appendix, if applicable.

he had no criminal record except for having been absent without leave from the Marine Corps (Tr. 531-32). On one such occasion he had been unable to get emergency leave to visit his critically ill mother, so he went home to see her without permission (Tr. 776). It was shortly after he was released from the brig that he was notified that his mother had died (Tr. 777). He was granted emergency leave and flew to Portland, Oregon, for her funeral, arriving on September 17, 1964 (Tr. 614, 777). In Portland, he stayed at the home of his aunt, Mrs. Robertson, who was the mother of the co-indictee, Jerry Rawls (Tr. 779, 780).

On the night preceding the funeral, Martin first went to the funeral parlor and spent half an hour alone with his mother (Tr. 779-80). He then left the funeral parlor and went drinking with his cousin, Jerry Rawls (Tr. 780).

The next morning, September 22, 1964, the body of Russell Anton Marleau was discovered (Tr. 295, 296). The time of death was fixed as the early morning of the date of discovery (Tr. 333-34). Although Marleau had received blows about the head, the Chief Medical Examiner determined that these blows were not the cause of death and would not have been fatal (Tr. 330). Instead, he concluded that Marleau died from manual strangulation, as indicated in part by fingernail marks on both sides of the neck (Tr. 327-28).

Martin Frazier was taken into custody two days later on September 24 (Tr. 469). He was taken to detective headquarters and interrogated (Tr. 470-71), after which he signed a written statement (Tr. 521-22). In the course of the interrogation and in the written statement, Martin admitted that he, Rawls and Marleau were together at the

time of Marleau's death and that an altercation had developed. He denied, however, that he had strangled, or had had any part in the strangling of Marleau (Tr. 476-519, 648-51; A. 50-76, 85-88). Martin was then taken before a magistrate and counsel appointed for him (Tr. 552).

About the time Frazier was being arraigned, Rawls was taken into custody (Sp. Tr. 14, 16).[2] The next day Rawls signed a statement admitting to the altercation, but denying that he was the one who strangled Marleau (Ex. 5, pp. 7-9, R. 20; A. 97-99, 5).

Frazier and Rawls were jointly indicted for first degree murder (Tr. 8-9; A. 28-29). Rawls pleaded guilty to a reduced charge of second degree murder, and at the time of Frazier's trial was in the county jail awaiting sentence (Tr. 741).

At Frazier's trial, the defense admitted that Frazier, Rawls and Marleau were together at the scene of the crime and that a fight developed during the course of which Frazier hit Marleau once or twice with a rock while Marleau was holding Frazier down. The defense contended, however, that Frazier did not strangle Marleau and that at the time when Rawls apparently strangled Marleau, Frazier was not aware of what was going on (Tr. 742-52). In so doing, the defense relied heavily on the fact that Frazier bites his fingernails to such a degree that the tabs of his fingers grow completely over where the ends of the nails ordinarily would be (Tr. 750-51, 799-801, 951-52); therefore, the defense suggested that Frazier's fingers could

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[2] Prior to Frazier's trial a hearing was held in connection with his motion to suppress certain evidence. The transcript of this hearing (Ex. 1, R. 18, 20; A. 25, 3, 5) will be cited herein as "Sp. Tr.," with parallel citations to the Single Appendix, if applicable.

not have left the fingernail impressions on Marleau's neck as described by the medical examiner (Tr. 320, 328).

The defense further contended that even if Frazier had participated in the crime, he would be innocent by reason of insanity (Tr. 752-64). The defense produced two psychiatrists and a psychologist who testified that because of an incipient schizophrenic illness, the recent death of his mother, the visit to the funeral parlor, and other circumstances, Frazier would not have understood the nature and the consequences of his acts at the time of Marleau's death (Tr. 856-59, 927-29, 943-51).

The prosecution, on the other hand, relied primarily upon circumstantial evidence in order to attack Frazier's version of what transpired. The state relied upon such items as discrepancies between Frazier's written statement and his testimony at trial (Tr. 829-30), the position of stains on his clothing (Tr. 721-22; Ex. 3, pp. 15-16, R. 20), and a witness who had heard someone call out for help during the night of the crime (Tr. 586-87). The prosecution also produced two psychiatrists who testified that Frazier would have been capable of knowing the nature and consequences of any of his acts that night (Tr. 962-63, 974-75).

The issues, therefore, were clearly drawn for the jury: (1) Based upon the credibility of his testimony, did Martin Frazier strangle Marleau or participate in the strangling of Marleau? (2) If so, was Frazier innocent by reason of insanity? (3) If guilty, what was the degree of his guilt?

III. Prosecution's Reference to Co-indictee's Confession in Opening Statement

Martin Frazier's trial for first degree murder commenced on January 26, 1965. Prior to selecting a jury, counsel met in chambers with the court in order to discuss certain preliminary matters (Tr. 2-7; A. 27-28). At that time, Frazier's counsel warned that he had been advised that same morning by counsel for Jerry Lee Rawls that Rawls had received a subpoena, but that Rawls would assert the Fifth Amendment if required to appear. Frazier's attorney stated the purpose of this warning: ". . . we would consider it prejudicial and deliberate misconduct on the part of the District Attorney to attempt to tell the jury what Mr. Rawls might testify to when he has been advised that Mr. Rawls wouldn't testify." (Tr. 6; A. 28). The District Attorney replied that he had heard a rumor that Rawls was going to assert the Fifth Amendment and that he was aware of the information recited to the court by Frazier's counsel. He stated, however, that his conduct with respect to Rawls would depend upon the information available to him at the time of his opening statement (Tr. 6; A. 28).

A jury was selected, and the next morning the District Attorney made his opening statement (Tr. 243-270; A. 29-47). In the course of his opening statement, after relating Frazier's written statement, the District Attorney set forth the substance of Rawls' confession:

> ". . . We are going to call Mr. Rawls as a witness in this case, and expect that he will testify substantially in the same general area although with some differences because it is Rawls' version that Marleau never

mentioned anything about sexual attacks or approaches or anything like that. He says Rusty, that was driving the Olds, was driving too fast and they were afraid and they wanted to stop the car and get the keys. When they tried to take the keys a fight ensued. Mr. Rawls says that Rusty got out of the car and came around the other side of the car and then walked toward Rawls and that Rawls hit Rusty first. This is Rawls' version; that there was an argument back and forth about the keys to this car and then Rusty hit Rawls. *Maybe I am wrong. I will look here as to whether Rawls said he hit him first.* No, I guess it is Rawls' position that Rusty hit Rawls . . . ." (Tr. 261-62; A. 41-42). (Emphasis added.)

The District Attorney then paraphrased almost sentence for sentence the remainder of Rawls' confession, which implied that Frazier strangled Marleau (Tr. 262-64; A. 42-43). This portion of the opening statement and Rawls' confession (Ex. 5, pp. 7-9, R. 20; A. 97-99, 5) are compared in Appendix A of this brief. As the transcript indicates, the District Attorney had in his hands Rawls' written confession, to which he referred during the course of his opening statement (Tr. 272; A. 48).[3]

Immediately after the close of the opening statement, the defense moved for a mistrial based upon the reading from Rawls' statement (Tr. 272; A. 48). The court declined to rule on the motion at that time (Tr. 272; A. 48).

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[3] "The Court: He had a statement in his hands, it was obvious he had some kind of a paper in his hands.

Mr. Goodwin: The record will show how close it was." (Tr. 272; A. 48).

Later in the trial the prosecution called Rawls as a witness. Rawls, appearing with one of his attorneys, invoked the Fifth Amendment and declined to answer any questions concerning the crime (Tr. 574-77; A. 78-80).

The defense renewed its motion for a mistrial, and a hearing was held outside the presence of the jury (Tr. 577-84; A. 80-85). Rawls' attorney stated that on two occasions he had told persons in the District Attorney's office that Rawls was not going to testify (Tr. 579; A. 81-82). The District Attorney replied that one of his deputies told him that "he felt sure" that Rawls was going to testify, and that several other persons advised him that Rawls planned to testify. (Tr. 580; A. 82). The court denied the motion (Tr. 583-84; A. 84-85). When the motion for mistrial was renewed later in the trial (Tr. 733; A. 88), the court denied the motion on the ground that the District Attorney did not specifically state that he had a statement from Rawls and did not quote exactly what Rawls had said (Tr. 734; A. 89). The court added that there was no evidence in the case that Rawls ever made a statement (Tr. 735; A. 89).

The jury was never specifically instructed to disregard that portion of the District Attorney's opening statement, although the court generally instructed the jury not to regard statements of counsel as evidence (Tr. 995; A. 95-96).

After Frazier's conviction of second degree murder, Rawls changed his plea and was tried and convicted of second degree murder. The conviction was reversed and remanded for new trial on the basis of erroneous instructions. *State* v. *Rawls*, —— Or. ——, 429 P.2d 574 (1967).

In the present case, the district court held that because of the opening statement Frazier was denied the right to confront and cross-examine Rawls when he took the Fifth Amendment (R. 25-26; A. 9). The court of appeals held that the controlling question should be the good faith or lack of good faith of counsel and whether the opening statement was unfairly prejudicial to the defendant. 388 F.2d at 779 (R. 41; A. 15-16). The court concluded that there was not sufficient evidence that the prosecutor acted in bad faith. 388 F.2d at 779-80 (R. 41; A. 16-18).

IV. Admission of Frazier's Written Statement

Martin Frazier was taken into police custody at approximately 4:15 p.m. on Thursday, September 24, 1964, and was brought directly to detective headquarters (Tr. 469-70, 473-74). At that time the investigation had focused upon Frazier and Rawls, based primarily on a tip received from a member of Rawls' family (Tr. 472, 474-75).

The interrogation of Frazier commenced around five o'clock that afternoon (Tr. 470-71). A tape recording had been made of the interrogation (Tr. 476-519; A. 50-76), and the tape was played back to the court in chambers in order to determine the admissibility of Frazier's written statement.

The sequence of events as revealed by the tape of the interrogation was essentially as follows:

1. Preliminary questioning, during the course of which Frazier admitted that he went out with his cousin, Jerry Rawls, on the night in question, but denied being with anyone else (Tr. 486-87; A. 56). Frazier stated that he had left his Marine uniform at a girl friend's house (Tr. 487-88; A. 56-57).

2. Frazier was then advised:

"Q. Well, you see, we asked you if you would come here today, because we wanted to talk to you, and you didn't object to coming. There are certain things that we want to ask you about, and if you want an attorney, why you can have an attorney. We want to question you about some things that might be important to you, at least they are important to us. What you say here could be used against you in a trial, you understand that?

A. Yes.

Q. You have been through this business before, I am sure, so you are aware of that. Now, we know that you were not altogether in the area of Scotty's Monday night, or early Tuesday morning. . . ." (Tr. 488; A. 57).

3. The questioning then became more accusatory and aggressive, but Frazier continued to deny that he was with anyone other than his cousin (Tr. 488-90; A. 57-58).

4. The interrogator then falsely advised Frazier that Jerry Rawls was already in custody and had confessed:

"Q. I am not trying to tell you anything. You tell us. We would like to have you tell us about this thing. Do you know where Jerry is?

A. I think he is over on 97th. That is where I left him.

Q. We know where Jerry is. Jerry has talked to us. Jerry has told us the whole story.

A. Where is he?

Q. Where do you suppose he is? He is not out walking the streets. He told us what happened.

A. I don't know what Jerry told you.

Q. We know. There is no use you trying to fool us. You are going to have to face this. So that we won't have to sit here an hour or two hours, would you just as sooh tell us now and get it over with?" (Tr. 490-91; A. 58-59).

In truth, Jerry Rawls was not arrested until some four hours later (Sp. Tr. 14), and the officers had not talked to Rawls as of the time of Frazier's interrogation (Tr. 474, 475).

5. The questioning continued (Tr. 491-92; A. 59). Knowing that Frazier had not eaten all day, the interrogator stated that Frazier could eat as soon as he told them what had happened.[4] Frazier then admitted that he had been with Marleau on the night of the crime and stated that Marleau had made homosexual advances toward him (Tr. 492-93; A. 60).

6. Frazier related the events which had occurred up to the time when the group arrived near the place where the crime occurred (Tr. 493-95; A. 60-61). At this point Frazier stopped and said:

"A. I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now.

Q. You can't be in any more trouble than you are in now. You have been with him, and you have gone

[4] The officer stated: ". . . I am sure you don't want to drag this out any longer than we want to drag it out. We would like to wrap this thing up, so to speak, and get you over there where you can get something to eat and get some rest. I know you haven't had anything to eat today, have you? A. No." (Tr. 492; A. 59).

down 82nd with him, and you say he started this whole business. So you turned down the street. And who persuaded him to park the car? Was this his idea to park the car and get out?" (Tr. 495-96; A. 61).

7. Frazier then made a detailed statement of how the fight occurred and his involvement in the fight (Tr. 496-510; A. 61-70), although he denied having strangled Marleau (Tr. 500; A. 64). Frazier stated that he had burned the uniform that he had worn the night in question (Tr. 508; A. 69).

8. The officer then offered to type up a written statement, asked Frazier whether he would sign the statement, and stated that the officer would testify as to Frazier's oral admissions if he did not sign:

"Q. . . . We are not going to force you to do it. You don't have to do it. It is entirely up to you. It is so much to your benefit, if anybody's, rather than prolonging the agony, because this way you can get in the facts, your knowledge about the guy being a queer and so on and so forth. You can take the stand and you will be able to get in some of these things. It is up to you if you want to do it. You understand we are not pressing you, not pressing you to do anything against your will. *You have already told us all of it. In the event we take the stand, we will testify to what we have talked about here,* and if we want to condense it and put it on paper, you have the right to read it and correct it, and you can sign it if you wish. We would like to do it that way. There is nothing that alters the facts. The only thing is it does give the facts. It doesn't alter the fact that you were there

and told us that. It isn't that we are trying to make out that you are guilty of something that you are not. You realize that. You have already told us. We knew that before we came and got you, or we wouldn't have came and got you. We knew who you were, and we told you the same story. You wouldn't object if we did it?

A. I don't know.

Q. O.K. If you don't object. I don't want to type this out and you say you don't want to. How about a cup of coffee. Could you go for that? Cream and sugar?" (Tr. 510-11; A. 70-71). (Emphasis added.)

The officer then told Frazier that from this point on he would have to depend upon his attorney and that the court would appoint him an attorney at his arraignment.[5]

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[5] "Q. All I can tell you is that everything is taken into consideration, from this point on you have got to depend on your attorney. You are not going to be railroaded. You are not going to be abused. You are not going to be slapped around and beat around, or anything. You are entitled to all the protection of the law. You will have an attorney. If you can't afford to hire one, the court will appoint you an attorney. You are going to have an attorney. We want to make this clear to you. You are entitled to an attorney. You are going to have the attorney, whether you pay for it or not. So you have got to put yourself in the hands of your attorney.

Now, there is a chance that you will be arraigned this evening. What they will do is issue the charge and if it is done this evening the judge will immediately appoint you an attorney tonight. *When you are arraigned he will immediately appoint you an attorney.* Don't feel that you are left all by yourself. You are not.

A. I am not no murderer. I don't understand what happened.

Q. We can understand how these things happen. They are certainly not condoned by society, that is for darn sure. But I wanted it made very clear to you that you have this right to an attorney and to know that the things that you say can be used against you in court. I don't want to underemphasize that. I want to emphasize that to you. You have these rights, and nobody can take them away from you. As I said before, we have some splendid attorneys here. If you are not satisfied with the attorney that is appointed, and if

9. Frazier was questioned further until a stenographer arrived, at which point the tape ends (Tr. 513-19; A. 72-76).

The interrogation ended shortly after six o'clock (Tr. 521). The stenographer began typing the written statement at 6:15, and Frazier signed the statement at 6:45 (Tr. 521, 541-42). The written statement (Tr. 648-51; A. 85-88) is basically similar to Frazier's oral admissions on the tape,[6] except that at the top of the mimeographed form of statement is a printed assertion that the signer is making the statement of his own free will, without fear, threats or promises, that the signer knows he is not required to make any statement, and that the statement may be used against him (Tr. 523, 648; A. 86). Typed in at the end of the statement are the words: "I hereby certify that I have been advised of my constitutional rights by the officers and waived my rights to have counsel present when the officers questioned me." (Tr. 522-23, 651; A. 87).

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you have funds, you can hire an attorney of your own choosing. We have competent attorneys, and the seriousness of this crime, they are going to be sure that you get a good attorney, because it is not their idea to get you an attorney that is not competent, because this is a grave crime. You are going to be appointed a good attorney so far as that is concerned. I wish you would just rest easy on that point. I know that you can't rest easy over what has happened. You are a normal boy, a young man, I should say, and you know what grave consequences can come out of this. It is just too bad these things happen, but they do. I feel sorry for you and your family. It is not good." (Tr. 511-13; A. 71-72). (Emphasis added.)

[6] The written statement asserts that Marleau tried to unzip Frazier's pants (Tr. 650; A. 87), although Frazier made no such assertion during the interrogation (Tr. 497-98, 501-02; A. 62-63, 65-66). At the trial Frazier denied that Marleau tried to unzip his pants, and the prosecution used the written statement to impeach Frazier's testimony on this point (Tr. 816, 830).

Frazier received no warnings or advice as to his constitutional rights other than those contained in the tape recording or recited in the written statement (Tr. 527; A. 76). Frazier testified that the reason he signed the written confession was because everything was already on tape, and he did not know that he had a right to a lawyer before signing the statement (Tr. 536).[7]

The Oregon trial court ruled that the written statement was admissible (Tr. 557-60; A. 76-78), and the statement was placed into evidence over the objections of the defense (Tr. 647; A. 85). The court instructed the jury that it could not consider the written statement unless it found that the statement was given voluntarily (Tr. 1010-11; A. 96).

During the course of the trial, Frazier took the stand and testified in his own defense. His testimony with respect to the fight which resulted in Marleau's death (Tr. 790-94; A. 92-94) was essentially the same as that contained in the written statement, except that he denied that Marleau tried to unzip his pants and admitted that he did not burn his uniform. The prosecution used these variations to attack his credibility (Tr. 829-30).

The district court held that Frazier's statement did not conform to the requirements of *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L.Ed. 2d 977 (1964), and

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[7] "Q. (By Mr. Goodwin) Would you have signed it if you had not relied upon the fact that it was already on tape and that it didn't make any difference whether it was taped or written? A. Right. Then I didn't know. I didn't know what was going on. I didn't know if it was right to make a statement, the way they were talking to me it was better for me. I didn't know I had a right to a lawyer before I signed the statement. They told me I had the right to a lawyer after I said everything that was on tape, and one thing led to another." (Tr. 536).

that the error was not cured merely because Frazier took the stand and testified substantially in accordance with his confession (R. 25; A. 9-10). The court of appeals held that *Escobedo* was limited to its facts and that the present case does not fall within the scope of those facts. 388 F.2d at 781-82 (R. 41; A. 18-21).

V. Search and Seizure of Contents of Frazier's Bag

While in Portland for his mother's funeral, Frazier stayed at the home of his aunt, Mrs. Robertson, who was the mother of the co-indictee, Jerry Rawls (Tr. 779, 780). Frazier and Rawls shared a bedroom in which Frazier kept his blue zippered compartmented bag (Sp. Tr. 26; Tr. 616, 632-33). The bag contained civilian and military clothing, together with toilet articles (Sp. Tr. 27-28). At the time it was seized by the police, the side pockets of the bag apparently contained certain articles of clothing belonging to Rawls (Sp. Tr. 23, 38-39).

Jerry Rawls was arrested when he came home at 9:30 p.m., September 24, 1964, at a point about one hundred feet from his house (Sp. Tr. 14, 16). The arresting officers asked Rawls if they could have the clothing that he wore the night in question (Sp. Tr. 20; A. 26). Rawls said that they could, and the officer asked where it was. (*Ibid.*) Rawls replied that it was in a blue duffel bag in his bedroom, but did not say to whom the bag belonged (Sp. Tr. 17, 20; A. 25, 26). The officers, along with Jerry Rawls' brother, went into the house and asked Mr. and Mrs. Robertson if they could have the bag; the Robertsons said "Yes." (Sp. Tr. 20; A. 26).

An officer went into the bedroom and brought the bag out (Sp. Tr. 20; A. 26). Another officer opened one of the

side zippered pockets, looked in it, and saw some clothing which he believed to be Rawls'. He then asked Mrs. Robertson if he could have the bag and the contents, and she said, "Yes." (*Ibid.*) The officer did not ask to whom the bag belonged (Sp. Tr. 23-24). He then zipped up the bag and left the house with it (Sp. Tr. 20; A. 26).

When the bag was later inspected, it was found to contain bloodstained clothing belonging to both Frazier and Rawls (Sp. Tr. 36-37) and a broken car key, later determined to belong to Marleau (Sp. Tr. 38-39; Tr. 714-16).

Frazier did not give anyone permission to take the bag out of the Robertsons' house or to open the bag or remove its contents (Sp. Tr. 28). The officers did not seek a warrant to search or seize the bag or its contents (Sp. Tr. 21; A. 26).

Prior to the trial, the defense moved to suppress the contents of the bag, but after a hearing the motion was denied (Sp. Tr. 58). At the trial the contents were received in evidence over the objections of the defense (Tr. 715, 716). The prosecution used Frazier's bloodstained clothing in its closing argument in an attempt to impeach Frazier's testimony as to his part in Marleau's death (Ex. 3, pp. 15-16, R. 20).

The district court did not pass on the search and seizure issue (R. 27; A. 10), but the court of appeals held that the search and seizure was lawful, and in the alternative held that the admission of the bag's contents was, at most, harmless error. 388 F.2d at 783 (R. 41; A. 21-22).

Summary of Argument

Petitioner, Martin Rene Frazier, submits that his Oregon trial, which resulted in his conviction for second degree murder was infected with three constitutional errors, each of which supports the judgment of the district court granting the writ of habeas corpus and requires reversal of the decision below.

I.

In his opening statement, the Oregon prosecutor read to the jury substantially all of the confession of Frazier's co-indictee and alleged accomplice, Rawls. When Rawls was called as a witness for the prosecution, he asserted his privilege not to testify, and he was excused from the stand. These events violated Frazier's Sixth Amendment right to confront and cross-examine Rawls, according to the principles of *Douglas* v. *Alabama*, 380 U.S. 415, 85 Sup. Ct. 1074, 13 L.Ed. 2d 934 (1965), and *Bruton* v. *United States*, 391 U.S. 123, 88 Sup. Ct. 1620, 20 L.Ed. 2d 476 (1968).

The Ninth Circuit held, however, that neither this case nor *Douglas* presented questions under the Sixth Amendment, but instead were to be analyzed in terms of prosecutorial misconduct, with the "controlling question" being the good or bad faith of the prosecutor. The court then held that the Oregon prosecutor had acted in good faith, even though he had been reliably warned that Rawls would refuse to testify.

The Ninth Circuit wrote its opinion prior to this Court's decision in *Bruton*. We submit that the premises of the decision below have been flatly refuted by *Bruton* and that

those premises conflict with recent decisions of the First Circuit and the Southern District of New York. *Robbins* v. *Small*, 371 F.2d 793 (1st Cir. 1967); *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580 (S.D.N.Y. 1967).

II.

At Frazier's Oregon trial, his written confession was received into evidence over objection. That confession was the end product of an oral interrogation. During that interrogation, Frazier received belated and perfunctory warnings of his rights to counsel and silence, but only after he had begun to incriminate himself. When he then requested the assistance of counsel, his interrogators turned aside and ignored his request and instead pushed him to further implicate himself.

On these facts, Frazier was denied his Sixth Amendment right to the assistance of counsel at a critical stage of the proceedings. *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L.Ed. 2d 977 (1964). This case is governed by *Escobedo* because the Oregon trial began on January 26, 1965. *Johnson* v. *New Jersey*, 384 U.S. 719, 86 Sup. Ct. 1772, 16 L.Ed. 2d 882 (1966).

In addition, the record shows that Frazier's confession was induced by deliberate and false representations that the alleged accomplice, Rawls, had already confessed and was induced by psychological coercion by the police. The confession was therefore involuntary and inadmissible under the Fifth and Fourteenth Amendments.

III.

The prosecution placed into evidence bloody clothing belonging to Frazier. The clothing had been taken from Frazier's duffel bag, which had been seized following the later arrest of Rawls. Frazier did not consent to the search of the bag, and the search was accomplished without a search warrant.

The Ninth Circuit upheld the search of the duffel bag on the theory that Rawls—some of whose clothing was in the bag—had consented to the search and that his consent was binding upon Frazier. Alternatively, the court held that the admission of the bloody clothing was harmless error.

Neither Rawls nor his family had authority to consent to the opening of Frazier's bag, and they particularly had no authority to authorize the search of the compartment of the bag containing Frazier's clothing or the seizure of that clothing. *Stoner* v. *California,* 376 U.S. 483, 84 Sup. Ct. 889, 11 L.Ed. 2d 856 (1964); *Reeves* v. *Warden,* 346 F.2d 915 (4th Cir. 1965). Moreover, once the bag was in police possession, there was no urgent or other reason for a search of its contents without a warrant.

It is inconceivable that the admission of bloody clothing allegedly worn by Frazier on the night of the crime was harmless, particularly in view of the prosecution's use of the clothing in its closing argument to prove Frazier a "liar." The alternative holding conflicts with the principles of *Fahy* v. *Connecticut,* 375 U.S. 85, 84 Sup. Ct. 229, 11 L.Ed. 2d 171 (1963), and similar later decisions.

ARGUMENT

I.

Frazier Was Denied the Right to Confront and Cross-Examine His Alleged Accomplice, Rawls, When Rawls Refused to Testify After the Prosecution Had Already Placed the Substance of Rawls' Confession Before the Jury in Its Opening Statement.

The fundamental rights of confrontation and cross-examination guaranteed by the Sixth Amendment were incorporated into the Fourteenth Amendment and made applicable to the states in *Pointer* v. *Texas*, 380 U.S. 400, 85 Sup. Ct. 1065, 13 L.Ed. 2d 923 (1965).

On two occasions since *Pointer*, this Court has held that the constitutional right of cross-examination must be protected with special diligence where a defendant is faced at trial with the confession of an alleged accomplice, *Douglas* v. *Alabama*, 380 U.S. 415, 85 Sup. Ct. 1074, 13 L.Ed. 2d 934 (1965); *Bruton* v. *United States*, 391 U.S. 123, 88 Sup. Ct. 1620, 20 L.Ed. 2d 476 (1968). In *Douglas*, the accomplice's confession was not admitted into evidence, but was placed before the jury by the prosecutor's interrogation of the defendant, who repeatedly asserted his privilege not to testify. In *Bruton*, the alleged accomplices were tried jointly; the oral confession of one (implicating the other) was testified to by a postal inspector. Read together, these cases establish the principles which control this case:

1. Where the prosecution places before the jury the substance of an accomplice's confession—but not the testimony of the accomplice—the defendant is denied his right of confrontation.

2. This denial is accomplished whether the accomplice's confession is placed into evidence directly or brought to the jury's attention by indirect means.

3. The incriminating statements of an accomplice are inherently suspect and prejudicial, and the denial of the right to cross-examine the accomplice is so fundamental that it cannot be cured by limiting instructions:

> ". . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare *Hopt* v. *Utah*, supra; Throckmorton v. Holt, 180 U.S. 552, 567, *Mora* v. *United States*, 190 F.2d 749; *Holt* v. *United States*, 94 F.2d 90. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed." *Bruton* v. *United States*, 391 U.S. at 135.

4. The denial of the right to cross-examine the accomplice is constitutional error requiring reversal, regardless

of the motives of the prosecutor. Compare *Brookhart* v. *Janis*, 384 U.S. 1, 86 Sup. Ct. 1245, 16 L.Ed. 2d 314 (1966), holding that denial of cross-examination is constitutional error of the first magnitude; and *Chapman* v. *California*, 386 U.S. 18, 23-24, 87 Sup. Ct. 824, 17 L.Ed. 2d 705 (1967), holding that a constitutional error requires reversal unless harmless beyond a reasonable doubt.

Bruton and *Douglas* share with the case at bar the common fact that effective confrontation of a confessing accomplice was denied when the confession was placed before the jury and the confessor exercised his privilege not to testify. For the reasons announced in *Bruton* and *Douglas*, the opinion of the Ninth Circuit upholding petitioner's conviction is wrong and must be reversed.

The Ninth Circuit erroneously held that the "controlling question" was the prosecutor's good faith or lack thereof. 388 F.2d at 779 (R. 41; A. 22). Apparently, that court confused the specific, fundamental right of confrontation with the more general prohibition against prosecutorial misconduct. Compare *Miller* v. *Pate*, 386 U. S. 1, 87 Sup. Ct. 785, 17 L.Ed. 2d 690 (1967) (prosecutorial misconduct by knowing use of false evidence); see "The Supreme Court, 1967 Term," 82 Harv. L. Rev. 63, 235 (1968).

We suggest that the Oregon prosecutor, if not guilty of misconduct, at the least, took a calculated risk that Rawls might testify, which failed. But, while those facts aggravate the constitutional error, they are not essential to the conclusion that Frazier's right of confrontation was denied. Frazier was just as surely denied his right to confront and cross-examine Rawls whether or not the prosecutor acted in "good faith," "bad faith," or negligently.

The Ninth Circuit, which filed its opinion and denied the petition for rehearing prior to this Court's decision in *Bruton*, supported its holding by a serious misreading of *Douglas*. The court stated that *Douglas* was a "flagrant case" of "bad faith" and so distinguished it from the presumably less flagrant case at bar. 388 F.2d at 780 (R. 41; A. 17-18). Yet, although counsel for *Douglas* argued to this Court that the misconduct of the prosecutor in that case was an adequate ground for decision,[8] there is nothing in the opinion of this Court which suggests that bad faith is the touchstone of decision. Indeed, even a cursory reading of the opinion suggests that its principles stand independent of prosecutorial motive.

In the period between *Douglas* and *Bruton*, two federal courts in addition to the Ninth Circuit were called upon to apply *Douglas* to denials of the right to confront alleged accomplices. *Robbins* v. *Small*, 371 F.2d 793 (1st Cir. 1967); *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580 (S.D. N.Y. 1967). Each court properly read *Douglas* and anticipated *Bruton* by holding that such denials require reversal regardless of prosecutorial motivation.

In *Robbins* v. *Small*, the First Circuit was faced with facts similar to those in *Douglas*. It noted that "basic fairness" required that the prosecutor discontinue his leading questions when the witness claimed his privilege, but it specifically refused to rest its holding on a finding of bad faith:

> "The fact that the prosecutor did not originally know that the witness intended to claim the privilege does not excuse his subsequent conduct nor is it of any con-

[8] See Brief of Petitioner, summarized in 13 L.Ed. 2d 1253.

sequence that in asking the questions he was not improperly motivated. The resulting prejudice was the same." 371 F.2d at 795, n. 11.

In *Deegan*, a joint trial, the court considered at length and rejected alternative claims of prosecutorial misconduct in other aspects of the case. 268 F. Supp. at 585-93. But its discussion of the confrontation issue makes no mention of misconduct as a contributing factor to its holding that petitioner's right of confrontation was denied. To the contrary, Judge Frankel's studied opinion is a remarkable harbinger of this Court's opinion in *Bruton*.

There can be little doubt that the Ninth Circuit's opinion in this case is in serious conflict with the principles of *Douglas, Robbins* and *Deegan*. But if there was ever any doubt, it has been completely dispelled by the decent decision in *Bruton*.

Bruton was a joint trial of two accomplices, Evans and Bruton. Evans had confessed orally, implicating Bruton, and a postal inspector testified to Evans' confession. Evans did not take the stand. There was no evidence of bad faith on the part of the prosecutor, and the court gave repeated and detailed instructions to the jury that Evans' confession must be disregarded as to Bruton. Yet, this Court reversed the conviction following the principles of *Pointer, Douglas* and *Jackson* v. *Denno*, 378 U.S. 368, 84 Sup. Ct. 1774, 12 L.Ed. 2d 908 (1964).

This Court has now decided that *Bruton* applies retroactively because the denial of the right to cross-examine a confessing accomplice is a "serious flaw in the fact finding process." *Roberts* v. *Russell*, 392 U.S. 293, 294, 88 Sup. Ct. 1921, 1922, 20 L.Ed. 2d 1100, 1102 (1968).

In the present case, the Oregon prosecutor was amply forewarned that Rawls might refuse to testify in Frazier's trial (Tr. 5-6, 579; A. 27-28, 81-82). Nevertheless, he elected to place Rawls' confession—implicating Frazier in exquisite detail—before the jury in his opening statement (Tr. 261-64, A. 41-43). The prosecutor gave the jury no reason to doubt either the existence or the truth of Rawls' confession. When Rawls invoked the Fifth Amendment, Frazier was not only denied his right of confrontation, but the jury may well have inferred both that Rawls had indeed confessed and that his statement was true.

One need not read beyond *Pointer* to realize that the right of confrontation and cross-examination is one of the essential elements of the adversary system:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." 380 U.S. at 405.

With all respect to the Ninth Circuit, there is nothing "wasteful and mischievous" (388 F.2d at 779; R. 41; A. 15) about a rule which seeks to protect this essential right against the most pernicious sort of infringement, the use against one defendant of his alleged accomplice's confession. On the contrary, we submit that the Ninth Circuit has announced the mischievous rule, a rule which, in the case at bar, has permitted a substantial and damaging intrusion

upon petitioner's Sixth Amendment rights. The decision below should be reversed, and the judgment of the district court reinstated.

II.

Frazier's Confession, Given After His Request for Counsel Had Been Ignored and After He Had Been Deceived Into Believing That His Alleged Accomplice Had Incriminated Him, Was Illegally Obtained and Its Admission Into Evidence Violated His Fifth and Sixth Amendment Rights.

The Sixth Amendment principles applicable to this record are those announced in *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L.Ed. 2d 977 (1964), since Frazier's trial occurred in the interim between that decision and the decision in *Miranda* v. *Arizona*, 384 U.S. 436, 86 Sup. Ct. 1602, 16 L.Ed. 2d 694 (1966). *Johnson* v. *New Jersey*, 384 U.S. 719, 86 Sup. Ct. 1772, 16 L.Ed. 2d 882 (1966). In addition to the Sixth Amendment issue, the record also presents a general question of voluntariness under the Fifth and Fourteenth Amendments.

After being taken into custody, Frazier was interrogated by the police at some length without being told of his Fifth Amendment right to remain silent, of the fact that anything he said could be used against him, or of his Sixth Amendment right to counsel (Tr. 477-88; A. 50-57). The investigation had focused on Frazier as a prime suspect prior to the time that he was questioned (Tr. 472). At the time of the interrogation, which began about 5:00 p.m., Frazier had not eaten all day, a fact of which the police were aware (Tr. 492; A. 59).

After Frazier had made some damaging statements about his Marine uniform, the detectives advised him, "if you want an attorney, why you can have an attorney;" and "What you say here could be used against you in a trial, you understand that?" (Tr. 488; A. 57). When Frazier indicated an understanding, the detectives continued their questioning, without affording Frazier any opportunity to exercise those rights. (*Ibid.*)

The police quickly assumed a more aggressive tack, confronting Frazier with a series of "facts." Among these "facts" was the deliberate misrepresentation that Jerry Rawls had been apprehended and "has told us the whole story." (Tr. 490; A. 58). In fact, Rawls was not arrested until four hours after Frazier's interrogation (Sp. Tr. 14, 16), and the "facts" related to Frazier were actually obtained from a tip given by a member of Rawls' family and from various other witnesses (Tr. 252-57; A. 35-39; Tr. 474-75).

In response to this police tactic, Frazier made additional admissions concerning his activities during the evening in question, prior to the time of the offense. But before Frazier revealed any details about Marleau's death, the following colloquy took place:

> "A. I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now.
>
> Q. You can't be in any more trouble than you are in now. You have been with him, and you have gone down 82nd with him, and you say he started this whole business . . . ." (Tr. 495-96; A. 61).

Psychiatric evidence introduced at Frazier's trial shows that he was then a passive, "intropunitive" person, prone to take the blame whenever accused of wrongdoing—so passive that he was but "a leaf blowing in the wind," and his daily defense was, "Do with me what you will." (Tr. 853, 854-55; A. 94, 95). His emotional status was "extremely immature" and he was a "conscientious conformist, rather shy and acceptant of discipline and direction." (Tr. 925-26; A. 95). See generally, Driver, "Confessions and the Social Psychology," 82 Harv. L. Rev. 42 (1968).

This record leaves little doubt that the police interrogators were skillfully playing upon Frazier's passivity and manipulating the questioning to pressure Frazier to confess. Only after Frazier had begun to answer questions did the police warn him of his rights. That warning was at best perfunctory and it was immediately followed by a long statement intimating that the police had evidence against Frazier and a suggestion that he confess (Tr. 488-89; A. 57).

When Frazier soon sought to exercise his Sixth Amendment right to counsel by the timid, but plain, request set forth above, the police used the same tactic—an accusing statement followed by aggressive questions—to turn aside the request (Tr. 495-96; A. 61-62).

Frazier thereupon confessed in some detail, although it is noteworthy that his statement varies significantly from that of Rawls. (Compare Tr. 496-510; A. 61-70 with Ex. 5, pp. 7-9, R. 20; A. 97-99, 5). This confession, reduced to writing and signed by Frazier, was admitted into evidence at Frazier's trial, after a finding by the trial judge that the confession was voluntary (Tr. 557-60; A. 76-78).

In admitting Frazier's confession, the Oregon trial judge seemed of the opinion that a defendant's rights under the Fifth and Sixth Amendments are not inviolate unless some element of trickery is also present:

> ". . . In almost every one of the cases which I have read, there has been some fact which would indicate some area of trickery, where there has been some real unfairness on the part of the police, something where they have gone beyond what justice would expect of police officers." (Tr. 558; A. 77).

The Ninth Circuit, on the other hand, appears to hold that Frazier's request for a lawyer was but a passing statement and that, if he had really wanted the assistance of an attorney, he would have pursued the matter. 388 F.2d at 782 (R. 41; A. 20-21). Moreover, the court of appeals held that the police were not bound to honor Frazier's request because he had not previously arranged for the assistance of a lawyer, as had Danny Escobedo. *Ibid.* Compare *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L.Ed 2d 977 (1964).

Even prior to Frazier's trial, the Oregon Supreme Court had recognized that the principles of *Escobedo* do not apply only to wealthy, sophisticated, or experienced defendants. *State* v. *Neely*, 239 Or. 487, 503, 395 P.2d 557, on rehearing, 398 P.2d 482, 486 (1965). Yet, the Ninth Circuit held in the case at bar that the principles of *Escobedo* are not applicable here because (1) Frazier's request for counsel was too timid and (2) Frazier did not request to see *his* counsel. It is unreasonable to assume that *Escobedo* was intended to be limited to aggressive defendants and

defendants with the foresight and funds with which to retain an attorney prior to arrest.

Moreover, the record in this case shows not only a violation of *Escobedo* principles, but also that Frazier's confession was induced by the police by deliberate factual misrepresentations and psychological coercion, making the confession involuntary and inadmissible under well-established Fifth and Fourteenth Amendment principles. The case of *Haynes* v. *Washington*, 373 U.S. 503, 83 Sup. Ct. 1336, 10 L.Ed. 2d 513 (1963), reaffirmed that "the question in each case is whether the defendant's will was overborne at the time he confessed," 373 U.S. at 513. As noted in *Davis* v. *North Carolina*, 384 U.S. 737, 86 Sup. Ct. 1761, 16 L.Ed. 2d 895 (1966), the absence or delay of constitutional warnings is a significant factor in considering the voluntariness of statements later made.

This Court must, of course, independently review the constitutional question whether Frazier's confession was improperly obtained and admitted into evidence. E.g., *Haynes* v. *Washington, supra; Ashcraft* v. *Tennessee*, 322 U.S. 143, 147, 64 Sup. Ct. 921, 88 L.Ed. 1192 (1944). We submit that Martin Frazier's confession was illegally obtained and his conviction was tainted by the admission of that confession. To the state's contention that Frazier waived this constitutional error by taking the stand in his own defense, we note only that his testimony was undoubtedly impelled by the prosecution's misuse of his and Rawls' confessions, and was, therefore, the fruit of the poisonous tree. *Harrison* v. *United States*, 392 U.S. 219, 88 Sup. Ct. 2008, 20 L.Ed. 2d 1047 (1968). The state can hardly insist on a waiver in such circumstances.

The decision below should be reversed, and the judgment of the district court reinstated on the further ground that Frazier was convicted with the use of an illegally obtained confession.

III.

Frazier's Duffel Bag, Which Was Searched Without a Warrant and Without Frazier's Consent, But With the "Consent" of Another Person, Was Illegally Searched and the Contents Were Received in Evidence in Violation of His Fourth Amendment Rights.

When Rawls was arrested outside his home, he disclosed to the police that his clothing was in a blue duffel bag in his room (Sp. Tr. 17, 20; A. 25-26). One of the officers went with Rawls' brother to the bedroom and brought the bag out. Another officer thereupon opened one of the side, zippered compartments of the bag (Sp. Tr. 20; A. 26). After observing the contents, he asked Rawls' mother for permission to take the bag and contents, which she granted (*Ibid.*). The police had no search warrant, at this or any later time (Sp. Tr. 21; A. 26).

The duffel bag was, of course, Frazier's, and its contents were largely his possessions, except for some of Rawls' clothing in the side, zippered pockets (Sp. Tr. 23, 27-28, 38-39).

The prosecution offered into evidence Frazier's bloody clothing which had been removed from the bag, and the trial court denied Frazier's motions to suppress the evidence and for a mistrial, finding that "third parties"—presumably Rawls or his mother—had consented to the taking

of the bag and apparently to the search of the contents of the bag (Tr. 735; A. 89-90).

Assuming that Rawls or his mother consented to the search of the contents of the bag, there is no evidence that either had authority to consent to such a search on behalf of Frazier, and therefore their consent is not binding on Frazier.

This aspect of the case is controlled by the principles announced in *Stoner* v. *California*, 376 U.S. 483, 84 Sup. Ct. 889, 11 L.Ed. 2d 856 (1964). There this Court held unlawful a search of a hotel room consented to by the manager:

> "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, . . . , which only the petitioner could waive by word or deed, either directly or through an agent. . . ." 376 U.S. at 489.

In *Reeves* v. *Warden*, 346 F.2d 915 (4th Cir. 1965), the Fourth Circuit applied *Stoner* to facts similar to the case at bar and held unlawful a search of the accused's dresser to which his mother had consented, even though the mother had access to the dresser and had used it for her own purposes:

> "If one person, even a member of the household, may on one occasion, without the knowledge or consent of the user, secrete a single object in one drawer of a bureau habitually and exclusively used by that person and thereby acquire the power to destroy the right of privacy secured to the user by the Fourth

> Amendment, then 'the right of the people to be secure in their persons, houses, papers, and effects * * *' becomes an illusory guarantee indeed." 346 F.2d at 925-26.

In *People* v. *Miller*, —— Ill. ——, 238 N.E. 2d 407 (1968), cert. denied, 37 U.S.L. Week 3191, No. 523, this Term, on November 25, 1968, the Illinois Supreme Court relied on *Stoner* to invalidate a search of the defendant's automobile, which was parked in the garage of the private home where defendant was employed. The owner of the house had consented to the search, and this consent was offered as justification. The Illinois court said:

> ". . . Regardless of the officer's good faith in making the search and his reliance upon the consent given by the owner of the house, the fact remains that it was Miller's constitutional right which was at stake." 238 N.E. 2d at 409.

In the present case the Ninth Circuit upheld the search of Frazier's duffel bag on the theory that Rawls or his mother had authority to and did in fact consent to the opening and search of the bag, and that the failure to determine their authority to consent or the ownership of the bag was immaterial. 388 F.2d at 783 (R. 41; A. 22). This holding invites careless police practices and unjustified intrusions upon the right of privacy secured by the Fourth Amendment. There is nothing unreasonable about a rule requiring the police to determine the ownership of luggage and obtain a proper warrant or consent, once the luggage is in their possession, prior to searching it. This Court said in *Stoner*:

> "... Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" 376 U.S. at 488.

As an alternative ground for its opinion, the Ninth Circuit held that the admission of the bloody clothing was at most harmless error, in part because Frazier took the stand in his own defense. 388 F.2d at 783 (R. 41; A. 22). This clothing was used by the prosecution in its closing argument in order to prove Frazier a "liar" (Ex. 3, p. 16, R. 20). We submit that the court of appeals' alternative holding is not supported on the record presented. Moreover, such a holding violates the "harmless error" principles of *Fahy* v. *Connecticut,* 375 U.S. 85, 84 Sup. Ct. 229, 11 L.Ed. 2d 171 (1963), *Chapman* v. *California,* 386 U.S. 18, 87 Sup. Ct. 824, 17 L.Ed. 2d 705 (1967), and the principle of *Harrison* v. *United States,* 392 U.S. 219, 88 Sup. Ct. 2008, 20 L.Ed. 2d 1047 (1968), holding that the state must prove beyond a reasonable doubt that Frazier's testimony was not impelled by the prior violations of his rights.

For these reasons, the decision of the Ninth Circuit should be reversed and the judgment of the district court should be reinstated.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed, and the judgment of the district court granting the writ of habeas corpus should be reinstated.

Respectfully submitted,

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December, 1968

APPENDIX A

Comparison of Portion of Opening Statement With Portion of Confession of Jerry Lee Rawls

Opening Statement

[illegible] the man in the Olds hit [illegible] first in the nose and [illegible] him back a little ways [illegible] Marty jumped out of the [illegible] and Rusty said something to [illegible] but Rawls didn't hear what [illegible] said.

[illegible] grabbed hold of Rusty and [illegible] walked to him and told [illegible] to let go.

Marty and Rusty didn't pay any attention to him, so Rawls says that Marty [illegible] picked up a rock off the ground and hit him in the back of the head.

All three struggled and fell over the bank. When they fell down Rawls said he kicked him in the ribs a couple of times and he was standing up then and Marty and Rusty were on the ground and he didn't know how much fighting [illegible] Where but he started to [illegible] back up toward the car. Rawls said he tripped trying to [illegible] on the bank on some wire [illegible] there is wire, and he fell back down and he could hear [illegible] grunting but he didn't say [illegible]

Rawls' Confession

[illegible] and then he hit me beside my nose on my cheek and knocked me back a little ways. Marty then jumped out of the car and Rusty said something to Marty, I don't know what it was.

Rusty then grabbed ahold of Marty. I walked over to them [illegible] to let go of Marty. He didn't pay any attention to me and I picked up a rock off the ground and hit him in the back of the head.

We all three struggled and fell over the bank. When we fell down I kicked him a couple of times in the ribs. I was standing up then and Marty and him were on the ground and I don't know how much fighting was going on at that time.

I tripped trying to run up the bank on some wire and fell back down. I could hear Rusty grunting but he didn't say a word.

APPENDIX A

Comparison of Portion of Opening Statement With Portion of Confession of Jerry Lee Rawls

Opening Statement	Rawls' Confession
. . . the man in the Olds hit Rawls first in the nose and knocked him back a little ways and Marty jumped out of the car and Rusty said something to Marty but Rawls didn't hear what it was.	. . . and then he hit me beside my nose on my cheek, and knocked me back a little ways. Marty then jumped out of the car and Russ said something to Marty. I don't know what it was.
Rusty grabbed hold of Marty and Rawls walked to him and told Rusty to let go.	Russ then grabbed ahold of Marty. I walked over to them and told Russ to let go of Marty.
Marty and Rusty didn't pay any attention to him, so Rawls says that Marty [sic] picked up a rock off the ground and hit him in the back of the head.	He didn't pay any attention to me and I picked up a rock off the ground and hit him in the back of the head.
All three struggled and fell over the bank. When they fell down Rawls said he kicked him in the ribs a couple of times and he was standing up then and Marty and Rusty were on the ground and he didn't know how much fighting went on there but he started to run back up toward the car. Rawls said he tripped trying to run up the bank on some wire, and there is wire, and he fell back down and he could hear Rusty gasping but he didn't say anything.	We all three struggled and fell over the bank. When we fell down I kicked him a couple of times in the ribs. I was standing up then and Marty and him were on the ground and I don't know how much fighting was going on at that time. I tripped trying to run up the bank on some wire and fell back down. I could hear Russ gasping but he didn't say a word.

Opening Statement	Rawls' Confession
He then threw the rock that he had used in back of the car and Marty also threw rocks in back of the car.	I then threw the rock that I using [sic] up behind the car. Marty also threw some up behind the car.
They then both started to drag Rusty toward a spot in the field that they had picked out; that Rusty was on his back and Rawls had a hold of him underneath the left arm-pit and by the trousers. Marty had a hold of him by his right side, but he didn't know what part exactly he had hold of.	We then both started dragging Russ toward a spot in the field that we picked out. He was on his back. I had a hold of him underneath the left armpit and by his trousers. Marty had a hold of the front part of his right side but I don't know what part of his body he had a hold of.
They stopped dragging him by the edge of the ditch and he, Rawls, fell in the ditch—after he slipped that he went to the other scene where they had been fighting and they kicked dirt over the bank where the blood was and that Marty got in the car on the driver's side and put a key in the ignition, got the key in but broke if off.	We stopped dragging him at the edge of the ditch. We started to drag him in and I slipped and fell. I climbed back out of the ditch and we left him there. We went back to the car and kicked dirt over the bank onto the blood stains. Marty got into the driver's side of the car and I went around and got in on the passengers side. Marty tried to find the right key for the ignition. He got a key into the ignition but broke it off.
That since they couldn't drive the car then they walked over to the Shell station on 82nd.	We couldn't drive the car then so we got out and walked. We then walked to the Shell Station on 82nd Street. One car passed us while we were walking toward the station.

OPENING STATEMENT

They went to the rest room and washed the blood off and then they went to the phone booth and Marty went inside and called and he stood by the phone booth, and the cab then came out in five or ten minutes to pick them up.

He said "We took all of the clothes off after we got home and put them in a travel bag, and went to bed about 5:00 o'clock in the morning." He says that when they got in the taxicab they both took off portions of the bloody clothing. He took off the sweater and Marty took off the shirt, as well as the hat, and they got off. Then the next morning when they got up Marty took a gold-colored cigarette lighter from his pocket, threw it on the bed, said "That lighter belongs to that guy last night.". And Rawls recognized the cigarette lighter as being one that Russell had had at the Harmony Inn. . . . (Tr. 262-64; A. 42-43).

RAWLS' CONFESSION

I went into the restroom at the station to wash the blood off me and Marty went over to the phone booth to call a cab. Then I went and stood by the phone booth and Marty went inside and washed up. We waited five or ten minutes and the cab picked us up. I don't know what cab company it was that came for us. The cab then took us from the station to 92nd and Woodstock. We walked from there on home, about 9 blocks.

We took all of our clothes off after we got home and Marty put them in his traveling bag and put it at the foot of the bed. We both went to bed and it was about 5:00 A.M. . . . (Ex. 5, p. 8, R. 20; A. 98-99, 5).

No. 643

In the Supreme Court
of the United States

OCTOBER TERM, 1968

MARTIN RENE FRAZIER, *Petitioner,*

v.

H. C. CUPP, Warden, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

Respondent believes that the questions formulated by petitioner are not fairly and accurately stated in the terms and circumstances of this case. Respondent would state the questions presented as follows:

1. Is the Sixth Amendment right to confront and cross-examine witnesses denied when the prosecutor in a criminal trial sets forth the expected testimony of a co-defendant in his opening statement, in a good-

faith belief that the co-defendant will testify for the prosecution, and the co-defendant subsequently refuses to testify?

2. Was the statement of a defendant admissible into evidence in a 1965 (pre-*Miranda*) trial when the statement was obtained as a result of in-custody interrogation, after defendant was advised that he had a right to an attorney and that any statement which he made could be used against him, and when defendant continued to answer questions after once speaking of getting a lawyer before he talked any more?

3. Is the Fourth Amendment prohibition against unreasonable searches and seizures violated by the seizure of a defendant's duffel bag and its contents, when the duffel bag also contains property of defendant's co-indictee, is situated on premises shared by defendant and the co-indictee, and is opened with the permission of the co-indictee?

STATEMENT

I. In General

Respondent cannot accept petitioner's statement of the case without substantial additions and corrections. Petitioner's statement is argumentative and fails to give an accurate picture of the case, inasmuch as matters favorable to petitioner are given undue emphasis, while less favorable facts are minimized or ignored. Respondent's additions and corrections are stated below.

II. Background of the Murder Trial

The synopsis of Frazier's prior life and his relationship to his mother is of questionable materiality to the issues before this Court.

Similarly, the psychiatric evidence adduced on behalf of Frazier in the state trial court is of little materiality here. Moreover, as petitioner points out, there was psychiatric testimony introduced by both sides in the trial of the case. That testimony was conflicting, and the conflict was for the jury to resolve.

What petitioner dismisses merely as "circumstantial evidence" against him requires fuller description. An automobile belonging to Marleau, the victim of the murder, was found at the scene of the crime (Tr. 303, 608).[1] There was blood in and around the car (Tr. 300). In the car were fingerprints subsequently identified as those of Frazier and Jerry Rawls, Frazier's co-indictee (Tr. 688-70). Part of a key to an automobile just traded in by Marleau was found in the car (Tr. 605-06). The other part of this key was later found in a duffel bag containing the clothes worn by Frazier and Rawls on the night in question (Tr. 716, 719). Frazier's clothes were blood-stained (Tr. 717-27). A cigarette lighter of the type owned by Marleau was found in Frazier's pants pocket (Tr. 405, 408, 449, 456, 600, 628-29).

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[1] Throughout this brief, "A" refers to the printed appendix. "Sp. Tr." refers to the one-volume transcript of the hearing on a motion to suppress certain evidence held prior to Frazier's Oregon trial, Exhibit 1 in these proceedings. "Tr.." refers to the six-volume transcript of Frazier's Oregon trial, Exhibit 2 in these proceedings.

Several witnesses saw Marleau in a tavern on the night of the murder with Frazier and Rawls (Tr. 458-60, 593-94). Later that night, two witnesses saw Frazier and Rawls alone on foot on the road between the tavern and the point where Marleau's body was found (Tr. 389, 394). Still later, one of these saw Frazier and Rawls making a telephone call from a pay telephone booth adjacent to a service station (Tr. 396). Examination of the telephone booth and of two dimes in the telephone coin box revealed the presence of blood (Tr. 439, 446, 727-28). Examination of the service station rest rooms the next morning revealed what appeared to be blood stains and paper towels with pinkish stains (Tr. 421, 590-91).

A cab driver testified that he picked up Frazier and Rawls at the service station and took them to a point near the house where they were staying (Tr. 368-69). His dispatcher corroborated this (Tr. 623).

Some weeks after Frazier and Rawls were arrested, two boys, one of them a relative of Marleau, found various papers belonging to Marleau on a pathway leading from the place where the cab driver left Frazier and Rawls to the place where they were staying (Tr. 412, 424). One of the papers had been executed on the night of the murder (Tr. 412-14, 424-25, 687).

The state's "witness who had heard someone call out for help" at the time and place of the crime in fact testified that she had heard several loud voices and many sounds of someone being hit and that the

sounds continued for about fifteen minutes (Tr. 586-87).

III. Prosecution's Reference to Co-indictee's Expected Testimony

To petitioner's narrative of the circumstances surrounding the calling of Rawls to the stand, it should be added that between the district attorney's opening statement and his calling of Rawls as a witness, there was no allusion to his expected testimony in the presence of the jury. Nor was any such allusion made at any time after Rawls invoked the Fifth Amendment.

Petitioner's summary of the hearing in chambers immediately after Rawls had refused to testify is inadequate. In that hearing, the district attorney testified as to the information he had received as to whether or not Rawls would testify against Frazier. He stated that after he had received information from Rawls' attorney that Rawls might refuse to testify, he had inquired into the matter. He had thereafter been informed by one of the sheriff's officers who had subsequently talked to Rawls, by a probation officer, and by at least two of Rawls' relatives, who had also talked to Rawls, that Rawls would testify; and it was on the basis of this later information that he had included Rawls' expected testimony in his opening statement (Tr. 580-81; A. 82).

Contrary to petitioner's assertion, the court of appeals did not conclude that there was "not sufficient evidence that the prosecutor acted in bad faith." While

it recognized that the state trial judge was in the best position to assess the good faith of the prosecutor and the prejudicial effect of his statement (A. 16), the court of appeals also concluded that the prosecutor acted "in a good faith expectation that Rawls would testify." (A. 18).

This Court may wish to note in passing that after Rawls' conviction was reversed, he was retried and again convicted of second degree murder. A second appeal to the Oregon supreme court is pending at this writing.

IV. Admission of Frazier's Written Statement

It should be noted that the police questioning of Frazier lasted only about one hour, between five and six o'clock on the afternoon he was taken into custody. He had been taken into custody about forty-five minutes before the questioning began (Tr. 469-71, 521).

Petitioner's assertion that the police "stated that Frazier could eat as soon as he told them what had happened" is a distortion of the words of the officer. The officer said: "We would like to wrap this thing up, so to speak, and get you over there where you can get something to eat and get some rest" (Tr. 492; A. 59).

It should also be noted that when the typewritten version of Frazier's statement was prepared, he was advised to read the statement carefully. Frazier signed the statement after reading it for approximately ten minutes (Tr. 523).

V. Search and Seizure of Contents of Frazier's Bag

To petitioner's recital of the facts pertaining to the search and seizure of Frazier's bag, respondent would add only that the bag did not bear Frazier's name (Sp. Tr. 23).

SUMMARY OF ARGUMENT

I

The present case does not involve testimony, or the equivalent in the jury's mind of testimony, as to the confession of a co-defendant. *Douglas* v. *Alabama*, 380 U.S. 415 (1965), and *Bruton* v. *United States*, 391 U.S. 123 (1968), are therefore not controlling here.

In Frazier's Oregon trial the district attorney told the jury in his opening statement what he expected the testimony of Jerry Rawls, Frazier's co-indictee, to be. In so doing, he paraphrased the contents of a statement previously given to the police by Rawls. He did not state to the jury that Rawls had confessed to the murder or indicate that he was then putting Rawls' statement before them.

Under these circumstances, the district attorney's remarks should not be regarded as the equivalent in the jury's mind of testimony by a co-defendant, but only as a statement of what the district attorney intended to prove. The jury was instructed that the statements of counsel are not evidence.

The Confrontation Clause of the Sixth Amendment should not be extended to include the statements

and arguments of counsel. Adequate standards already exist for judging the conduct of counsel in criminal cases: the good faith of counsel and the likelihood of unfair prejudice to the defendant. In this case, these tests are satisfied.

Prior to making his opening statement, the district attorney had inquired into whether or not Rawls would testify against Frazier; and according to the best information available to him when he made his opening statement, Rawls was willing to testify. Accordingly, the court of appeals correctly held that the district attorney acted in good faith.

Rawls was on the witness stand only momentarily, and neither before nor after he invoked the Fifth Amendment was there any further reference to his expected testimony in the presence of the jury. The trial was a lengthy one; and much evidence implicating Frazier was presented. Accordingly, the court of appeals properly agreed with the state trial judge that there was no unfair prejudice to Frazier.

II

This 1965 trial involves a relatively brief interrogation of a criminal defendant shortly after he was taken into custody. Early in the interrogation, and before he had made any statement of significance, Frazier was advised that he had a right to counsel and that anything he said could be used against him. He once spoke vaguely of getting a lawyer, but he made no further reference to the subject. After hearing a tape recording of the entire interrogation, the

state trial judge concluded that Frazier's remark, in the context in which it was made, was not to be interpreted as a request for counsel. Under these circumstances, Frazier's written statement was properly held admissible into evidence.

Moreover, Frazier took the stand in his own defense, and his testimony was substantially identical to the matters contained in his written statement. In view of the other evidence putting Frazier at the scene of the crime and implicating him in the murder, it seems clear that his testimony was not impelled by the admission of his statement. He thus should be held to have waived his objection to its admission.

III

Frazier's duffel bag was situated on premises occupied jointly by him and his co-indictee, Jerry Rawls. It contained the clothing worn by both Frazier and Rawls on the night of the murder. Rawls apparently had Frazier's permission to use the bag. It was taken into custody by the police in connection with Rawls' arrest and with the consent of Rawls and other occupants of the premises.

Under these circumstances, Rawls could validly consent to the taking and opening of the bag by the police, at least for the purpose of obtaining his own clothing. And once the bag was lawfully opened, the police were entitled to seize any other property which they observed and which would constitute evidence of the crime under investigation.

The search and seizure in this case was therefore

reasonable. Frazier's argument to the contrary is based on cases involving an exclusiveness of occupancy and possession which is absent here.

ARGUMENT

I

Frazier was not denied the right to confront and cross-examine his co-indictee, Jerry Rawls, when the district attorney told the jury in his opening statement what he expected Rawls' testimony to be, in a reasonable and good-faith belief that Rawls would testify.

Frazier asks this Court to apply the reasoning of *Douglas* v. *Alabama*, 380 U.S. 415 (1965), and *Bruton* v. *United States*, 391 U.S. 123 (1968), to the opening statement made by the district attorney in his 1965 trial. Such an extension of the reasoning of those cases would be greater than is warranted by any prior decision, state or Federal; and it is not warranted under the circumstances of the present case.

In *Douglas*, the state called as a witness a co-defendant who claimed the privilege against self-incrimination and refused to testify. However, the prosecutor continued to question the witness, using a document subsequently identified as a written confession made and signed by him. The prosecutor read from the document, pausing after every few sentences to ask "Did you make that statement?" The witness invoked the privilege against self-incrimination to each of twenty-one such questions.

This Court held that, under these circumstances,

the conduct of the prosecutor constituted a denial of defendant's right of cross-examination as secured by the Sixth and Fourteenth Amendments. The Court noted that, by questioning the witness at length about an alleged statement and causing the witness repeatedly to invoke the privilege against self-incrimination in the presence of the jury, the prosecutor apparently sought to create the impression not only that the witness had made a statement, but also that it was true. The Court pointed out that, while the matter put before the jury was not technically testimony, it was near enough to it to require a reversal of defendant's conviction. The Court said:

> Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. 380 U.S. at 419.

But this is not the situation in the present case, which, it may be noted parenthetically, was tried prior to this Court's decision in *Douglas*. Here, the district attorney, unlike the prosecutor in *Douglas*, did not tell the jury that he had a statement from the co-defendant or indicate that he was then putting that statement before them (Tr. 734; A. 89). He merely set forth in a lengthy opening statement the expected testimony of defendant's co-indictee, among other witnesses. The jury was instructed that the statements of

counsel are not evidence (Tr. 995; A: 95-96). Neither the state trial judge, who was in the best position to assess the effect of the district attorney's remarks, nor the Oregon supreme court, nor the court of appeals regarded those remarks as a putting of Rawls' confession before the jury, either directly or indirectly, but only as a summary of expected testimony. Under these circumstances, the district attorney's remarks should not be regarded as "the equivalent in the jury's mind of testimony."

In *Bruton* v. *United States*, 391 U.S. 123 (1968), a postal inspector testified during a joint trial as to a confession made by a co-defendant which implicated Bruton. Such an out-of-court statement is, of course, hearsay as to persons other than the declarant; and the trial court instructed the jury that the statement in question was not to be considered against Bruton. This Court held that, under the circumstances of that case, the possibility that the jury might be unable or unwilling to follow such an instruction was so great as to require reversal.

However, *Bruton* is readily distinguishable from the present case. Here the Court is not concerned with a joint trial, but with the separate trial of one of two persons jointly indicted for murder. The Court is not concerned with a co-defendant's confession presented as such to the jury, but merely with a paraphrase of the content of such a confession in the district attorney's opening statement. Consequently, the Court is not concerned with the problem of whether or not a

jury can and will follow an instruction that they may consider evidence against one defendant and must disregard it as to another, but with the problem of whether or not a jury can and will follow an instruction that the statements of counsel are not evidence. For these reasons, as well as those already stated in the discussion of *Douglas* v. *Alabama* above, *Bruton* is not in point here.

Moreover, this Court has held that *Bruton* applies retroactively in state and Federal trials. *Roberts* v. *Russell*, 392 U.S. 293 (1968). It is not the purpose of this argument to suggest any disagreement with the Court's holding in *Bruton*, or with *Bruton's* retroactive application to cases which present the same fact situation. Nevertheless, the very fact that *Bruton* does apply retroactively suggests that this Court should be cautious in extending its principles to cases which present different facts.

In holding that the constitutional principles established in other cases do not apply retroactively, this Court has frequently recognized the prevailing importance of such factors as the reliance by law enforcement authorities on the previously existing standards and the effect upon the administration of justice of a retroactive application of the new standards. See, *e.g.*, *De Stefano* v. *Woods*, 392 U.S. 631 (1968); *Stovall* v. *Denno*, 388 U.S. 293, 296-301 (1967). The same factors argue, with at least equal persuasiveness, against expanding beyond its original scope a rule already determined to apply retroactively, as Frazier seeks to do here.

Thus, Frazier's argument that the Confrontation Clause of the Sixth Amendment is violated whenever the substance of an accomplice's confession is placed before the jury under any circumstances whatever is an overstatement of this Court's holdings in *Douglas* and *Bruton*. The reasoning behind those decisions is of considerably less force in the present case. The possibility of a jury being improperly prejudiced by the substance of the confession of a co-defendant is greatly diminished where, as here, there is no explicit reference to a confession, the prosecutor merely says in his opening statement what he expects the testimony of the co-defendant to be, and the jury is instructed that the statements of counsel are not evidence. Indeed, the precise reasoning of *Douglas* and *Bruton* is of so little force in the present situation that there appears to be no reported case, state or Federal, which has ever applied the Confrontation Clause to the statements or arguments of counsel. The two other cases relied on by Frazier, *Robbins* v. *Small*, 371 F.2d 793 (1st Cir. 1967), and *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580 (S.D. N.Y. 1967), are practically "on all fours" with *Douglas* and *Bruton* respectively; but for that very reason, they add nothing to the principles established by this Court in those cases.

It is, of course, improper for a prosecutor to set forth matter in his opening statement which he knows, or reasonably should know, he cannot substantiate by competent evidence. But this is a matter for the courts to judge on the basis of the good faith of the prose-

cutor. The record in this case shows that, according to the best information available to the district attorney at the time he made his opening statement, Rawls was willing to testify against Frazier (Tr. 580-81; A. 80-83); and the district attorney naturally expected him to testify in accordance with his prior statement. Accordingly, the court of appeals properly concluded that the district attorney acted in good faith here. See also *State* v. *Frazier*, 245 Or. 4, 8-9, 418 P.2d 841, 843 (1966).

In some cases, regardless of the prosecutor's good faith, the fact that matter set forth in an opening statement is not competently proved could be sufficiently prejudicial that the failure of the trial court to grant a mistrial would constitute a violation of due process. Indeed, it was as a denial of due process that Frazier's objection to the district attorney's opening statement was originally presented in the Oregon courts (see, *e.g.*, Tr. 582-84; A. 83-84) and in the Federal district court (A. 4). But this is a matter for the courts to judge on the basis of the degree of prejudice involved. And in this case, the state trial court and the court of appeals properly concluded that there was no prejudice sufficient to require a mistrial, considering that there was only one reference to Rawls' expected testimony in the course of a lengthy trial, that Rawls was on the witness stand only briefly, that there was considerable other evidence against Frazier, and that the jury was properly instructed not to consider the remarks of counsel as evidence.

Thus, standards already exist for judging the re-

marks of counsel in criminal trials: the good faith of counsel and the likelihood of unfair prejudice to the defendant. *Cf. Namet* v. *United States*, 373 U.S. 179, 186-87 (1963). There is no need to expand the Confrontation Clause to the extent urged by Frazier, merely because courts below have held that the reference to Rawls' expected testimony in the context of Frazier's trial did not require reversal by those standards.

To expand the Confrontation Clause to the extent urged by Frazier would do violence to the meaning of the Constitutional phrase, "the witnesses against him." It would obscure the distinction between statements of counsel and evidence. It would make the prosecutor act at his peril in stating to the jury what he expects any witness' testimony to be, since any witness may unexpectedly die, prove unavailable, or claim a privilege not to testify. And it is simply not necessary, since adequate standards already exist to prevent criminal defendants from being prejudiced by improper statements of counsel, when such improprieties in fact occur.

II

The admission into evidence of Frazier's confession violated none of his constitutional rights.

In this 1965 case, the police and the trial court had to follow and apply the standards pronounced by this Court only a few months before Frazier's arrest and trial, in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). The stricter standards of *Miranda* v. *Arizona*, 384

U.S. 436 (1966), are not applicable. *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

The case involves a relatively short interrogation of a defendant about forty-five minutes after he was taken into custody on September 24, 1964, and immediately upon his arrival at police headquarters (Tr. 469-71). The tape recording of the police questioning shows that Frazier was advised that he had a right to counsel and that any statement he made could be used against him. This advice was given before Frazier made any of the damaging admissions contained in his written statement, and he stated that he understood those rights (Tr. 488; A. 57). Moreover, the written statement itself contains an acknowledgment that Frazier understood and waived his constitutional rights, and Frazier read the statement carefully before signing it (Tr. 523). It is true that during the questioning Frazier once spoke vaguely of getting a lawyer, but he made no further reference to the subject (Tr. 524). And after hearing the recorded interrogation, the trial court held that this ambiguous statement, in the context in which it was made, was not to be interpreted as a request for counsel (Tr. 737; A. 91). Under these circumstances, it is submitted that the trial court properly held that Frazier's written statement was admissible into evidence.

Moreover, it should not be necessary for this Court to pass upon the admissibility, by *Escobedo* standards, of Frazier's written statement. In his trial, Frazier took the witness stand in his own behalf, gave substantially identical testimony, and admitted that the

statement was essentially true. For this reason the Oregon supreme court held that Frazier had waived his objections to the admissibility of his written statement. *State* v. *Frazier*, 245 Or. 4, 9, 418 P.2d 841, 843-44 (1966).

The Oregon court's holding was in accord with numerous other jurisdictions which have recognized that, in very limited circumstances, a defendant may waive the constitutional objections to the admission of his prior statements by taking the witness stand and repeating the substance of those statements. See, *e.g.*, *Bell* v. *People*, 158 Colo. 146, 406 P.2d 681, 684 (1965), cert. den. 384 U.S. 1024 (1966); *People* v. *Skidmore*, 69 Ill. App. 2d 483, 217 N.E.2d 431, 433 (1966); *Commonwealth* v. *Chase*, 350 Mass. 738, 217 N.E.2d 195, 198, cert. den. 385 U.S. 906 (1966); *State* v. *Woodards*, 6 Ohio St. 2d 14, 215 N.E.2d 568, 574, cert. den. 385 U.S. 930 (1966); *State* v. *Freeman*, 232 Or. 267, 279, 374 P.2d 453, 459 (1962), cert. den. 373 U.S. 919 (1963); *Commonwealth ex rel. Edowski* v. *Maroney*, 423 Pa. 229, 223 A.2d 749, 752 (1966); *Lester* v. *State*, 216 Tenn. 615, 393 S.W.2d 288, 292 (1965), cert. den. 383 U.S. 952 (1966).

These cases make it clear that this rule is a narrow one. It applies only when four conditions are met: (1) the defendant must be represented by competent counsel; (2) his testimony on direct examination must be substantially identical with the statements allegedly obtained in violation of his constitutional rights; (3) his testimony must not tend to deny, minimize,

or explain away his prior statements; and (4) he must not be forced to take the stand as a result of the admission of his prior statements. It seems clear that the first three conditions are satisfied here; and, as will be shown in the next two paragraphs, so is the fourth.

While the principles stated by this Court in *Harrison* v. *United States*, 392 U.S. 219 (1968), limit the possibility of a valid waiver of constitutional objections, it would seem that, unlike Harrison, Frazier's trial testimony was not impelled by the use of his written statement. In the present case, defense counsel seem to have put Frazier on the stand largely to have him testify as to his general background and to give the jury a basis for evaluating the psychiatric testimony concerning him which was later introduced. More significantly, the other evidence putting Frazier at the scene of the crime and implicating him in the murder was substantial. He had been seen with the deceased earlier in the evening, he was seen near the scene of the crime around the time of its commission, his fingerprints were found in the deceased's car, his clothes were blood-stained, and some of the deceased's personal effects were found both in Frazier's travel bag and along the route apparently used by Frazier and Rawls when they returned home.

With this evidence already before the jury, it is logical to infer that Frazier and his counsel would desire to present testimony that, while Frazier was present at the commission of the crime, he was not the

actual strangler. And this is essentially all that his written statement says. Under these circumstances, the logic of *Harrison* should not be controlling here.

III

The search and seizure of Frazier's duffel bag and its contents was reasonable, since it was situated on premises occupied jointly by Frazier and his co-indictee, contained the clothing of both Frazier and the co-indictee, and was taken in connection with the arrest of the co-indictee and with the permission of the co-indictee and other occupants of the premises.

The facts pertaining to the search and seizure of Frazier's bag are not in dispute. Frazier was staying temporarily in the home of his aunt (Tr. 779-80). Immediately prior to its seizure, his bag was situated in a bedroom which Frazier and his co-indictee, Jerry Rawls, were sharing (Sp. Tr. 26; Tr. 616, 632-33). The bag did not bear Frazier's name (Sp. Tr. 23). At the time of its seizure, the bag contained clothing belonging to Rawls, at least most of which was contained within one of the bag's three compartments (Sp. Tr. 23, 38-39).

The police acquired the bag at the time of Rawls' arrest and in connection with his arrest, though not incident thereto in the legal sense. At the time of his arrest, Rawls consented to the taking of his own clothing and indicated that it was in the bag in question (Sp. Tr. 20; A. 25-26). Rawls' mother, one of the occupants of the house, consented to the taking of the bag (*Ibid.*). After the police opened the bag and ascertained that it did in fact contain Rawls'

clothing, they again asked and received permission from the occupants of the house to take the bag with them (*Ibid.*). A more detailed examination of the contents of the bag, at some time after it was taken, produced evidence used against Frazier, notably his blood-stained clothing and the broken half of a car key belonging to the murder victim (Sp. Tr. 38-39; Tr. 714-16).

Frazier contends that the search of his bag under these circumstances violated his Fourth Amendment rights, since he did not consent to the search and the police did not obtain a warrant to search the bag after taking custody of it. But the reasonableness of a search and seizure depends upon the peculiar facts and circumstances of each case. *Cooper* v. *California*, 386 U.S. 58, 59 (1967); *Harris* v. *United States*, 331 U.S. 145, 150 (1947). And in this case, the facts disclose nothing unreasonable about the actions of the police.

Frazier does not deny that Rawls consented at the time of his arrest to give the police the clothing which he, Rawls, wore on the night of the murder. He does not deny that Rawls' clothing was contained in his bag. He does not deny that the bag bore no external evidence of ownership. He does not deny that the bag was situated in a part of the premises which was not exclusively his. And he does not deny that the police took custody of the bag with the permission of other occupants of the residence, whose right to use the part of the premises where the bag was situated was at least equal to his.

It would seem, then, that Frazier admits that the police did have a valid consent to take custody of his bag and that, at least to this extent, the search and seizure in this case was proper. In any event, it seems clearly settled that where multiple ownership or occupancy of premises exists, any one owner or occupant may permit a search without a warrant; and if incriminating evidence is found, it may be used against all. See, *e.g.*, *Wright* v. *United States*, 389 F.2d 996, 998 (8th Cir. 1968); *Nelson* v. *California*, 346 F.2d 73, 77 (9th Cir. 1965); *United States* v. *Sferas*, 210 F.2d 69, 74 (7th Cir.), cert. den. 347 U.S. 935 (1954); 1 Varon, Searches, Seizures & Immunities 443-44 (1961); 4 Wharton, Criminal Law & Procedure § 1579 (Anderson ed. 1957).

Indeed, Frazier has never contended that the taking of the bag was improper, but only that the subsequent search of the bag and seizure of its contents violated his constitutional rights (See Tr. 735-36; A. 90). However, this argument is untenable under the facts of this case.

Frazier admits that the bag contained clothing belonging to Rawls which Rawls consented to give the police at the time of his arrest. He does not contend, and never has contended that Rawls' use of the bag was without his permission. In the absence of such a contention, the courts below have properly concluded that Rawls did have Frazier's permission to use the bag. And if Rawls had permission to use the bag for the purpose of secreting his clothing, it seems

clear that he could properly consent to a search of the bag, at least for the purpose of retrieving his own clothing. The rule here should be no different from the rule regarding jointly occupied premises cited above.

It seems clear from the record of this case that the police obtained and searched the bag for the purpose of retrieving Rawls' clothing. And once they had opened the bag lawfully, they were entitled to seize any other property, such as Frazier's bloodstained clothing, which was in plain sight, *Harris* v. *United States*, 390 U.S. 234, 236 (1968), and which would constitute evidence of the crime under investigation. *Warden, Maryland Penitentiary* v. *Hayden*, 387 U.S. 294, 300-01 (1967).

An additional and alternative basis for upholding the search of Frazier's bag may be derived by comparing the facts of the present case with those of *Cooper* v. *California*, 386 U.S. 58 (1967). Assuming, as seems to be conceded, and as is established by the facts of this case in any event, that the police had lawfully obtained custody of the bag, it would seem that they were entitled to search it under the rationale of *Cooper*. Here, as in *Cooper*, the search in question was of a readily movable piece of personal property, even though Frazier's bag, unlike Cooper's automobile, was not capable of moving under its own power. And here, as in *Cooper*, the reason for and nature of the police custody of the thing searched would seem to justify the search. The police seized Frazier's

bag, as Cooper's car was seized, because of the crime for which the arrest was made. Their subsequent search of the bag, like the search of Cooper's car, was closely related to the reason for the arrest and to the reason the bag was retained. The fact that the search in this case was made in connection with the arrest of Frazier's co-indictee, rather than that of Frazier, should not be material where the co-indictee was using Frazier's bag, apparently with Frazier's permission, where there was no exterior indication of who actually owned the bag, and where the bag was situated on premises occupied by both.

The cases cited by Frazier are not in point here. Two of them presented situations in which the person giving the consent to search was clearly in no position to do so. In *Stoner* v. *California*, 376 U.S. 483 (1964), this Court held that a hotel clerk could not authorize the search of a guest's room. In *People* v. *Miller*, — Ill —, 238 N.E.2d 407 (1968), the Illinois supreme court held that the owner of premises on which an automobile was situated could not authorize the search of the automobile, when it did not belong to him and when he had no other connection with it.

The third case cited by Frazier, *Reeves* v. *Warden, Maryland Penitentiary*, 346 F.2d 915 (4th Cir. 1965), involved an exclusiveness of occupancy which is absent here. *Reeves* held only that one tenant or guest in a private residence could not authorize the search of a room and a bureau used exclusively by another tenant or guest. It was conceded in that case that

the room was used exclusively by the accused, and the trial court found that the bureau was also set aside for his exclusive use. 346 F.2d at 924. But such is not the case here. And in the nearly contemporaneous case of *Rees* v. *Peyton*, 341 F.2d 859 (4th Cir. 1965), the same court which decided *Reeves* upheld the search of a suitcase, consented to by a third person under circumstances much more similar to those in the present case.

The present case does not depend upon the fictitious "apparent authority" relied upon in *Stoner* and *Miller*. Nor does it involve premises or property used exclusively by the person against whom the evidence in question was introduced, as in *Reeves*. And these cases should not be used, as Frazier seeks to do here, to establish a rule that evidence taken with the permission of one of several occupants of premises or property can never be used against one who did not personally consent to the taking.

Frazier also contends that the courts below should have required the police to obtain a warrant prior to searching the bag, because it was in police custody and there was no urgent or other reason for a search of its contents without a warrant. But it seems clear that it is not enough to show that the police could have obtained a search warrant. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. *Cooper* v. *California*, 386 U.S. 58, 62 (1967); *United States* v. *Rabinowitz*, 339 U.S. 56, 66 (1950).

For these reasons, the courts below properly rejected Frazier's search and seizure arguments. The Oregon supreme court appropriately summarized the matter in *State* v. *Frazier*, 245 Or. 4, 8, 418 P.2d 841, 843 (1966):

> In this case, the officer acted with the consent of Rawls, who, so far as the record discloses, was authorized to use the bag for the storage of his own clothing. Only unreasonable searches and seizures come within the interdict of the Fourth Amendment, and what is reasonable depends upon the facts and circumstances of each case. . . .
>
> When, as in this case, the officers acted on the authority of the apparent owner and established user of the bag, it cannot be contended that the constitutional rights of the defendant against unreasonable search and seizure were invaded simply upon the ground that it later appears that the defendant was the owner of the bag and some of the clothing therein.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals should be affirmed.

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JANUARY 1969

SUPREME COURT OF THE UNITED STATES

No. 643.—October Term, 1968.

Martin Rene Frazier, Petitioner, v. H. C. Cupp, Warden. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 22, 1969.]

Mr. Justice Marshall delivered the opinion of the Court.

Petitioner was convicted in an Oregon state court of second-degree murder in connection with the September 22, 1964, slaying of one Russell Anton Marleau. After the Supreme Court of Oregon had affirmed his conviction, 245 Ore. 4, 418 P. 2d 841 (1966), petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Oregon. The District Court granted the writ, but the Ninth Circuit Court of Appeals reversed, 388 F. 2d 777 (1968). We granted certiorari to consider three contentions of error raised by petitioner. 393 U. S. 821 (1968). Although petitioner's case has been ably briefed and argued by appointed counsel, we find none of these allegations sufficient to warrant reversal.

I.

Petitioner's first argument centers on certain allegedly prejudicial remarks made during the prosecutor's opening statement. Petitioner had been indicted jointly with his cousin, Jerry Lee Rawls, who pleaded guilty to the same offense. Prior to petitioner's trial, petitioner's defense counsel told the prosecutor that Rawls would invoke his privilege against self-incrimination if he were called to the stand; defense counsel warned the prosecu-

tor not to rely in his opening statement upon Rawls' expected testimony. The prosecutor replied that he would act on the basis of "all of the information I have concerning [Rawls'] testimony." Before trial, he consulted with a police officer who had spoken to Rawls and with Rawls' probation officer; each indicated his belief that Rawls would testify. Similar information came, through a sheriff's report, from some of Rawls' close relatives. Because of these reports, the prosecutor concluded that Rawls would testify if asked to do so. The court below felt that the prosecutor also relied on the fact that Rawls had pleaded guilty and was awaiting sentence. This would give him reason, the court felt, o cooperate with the prosecutor.

In any case, after the trial began the prosecutor included in his opening statement a summary of the testimony he expected to receive from Rawls. The summary vas not emphasized in any particular way; it took only a few minutes to recite and was sandwiched between a summary of petitioner's own confession and a description of the circumstantial evidence the State would introduce. At one point the prosecutor referred to a paper he was holding in his hands to refresh his memory about something Rawls had said. Although the State admitted in argument here that the jury might fairly have believed that the prosecutor was referring to Rawls' statement, he did not explicitly tell the jury that this paper was Rawls' confession, nor did he purport to read directly from it. A motion for a mistrial was made at the close of the opening statement, but it was denied. Later, the prosecutor called Rawls to the stand. Rawls informed the court that he intended to assert his privilege against self-incrimination in regard to every question concerning his activities on the morning of September 22, 1964. The matter was not further pursued, and Rawls was dismissed from the stand. His appearance could not have lasted

more than two or three minutes. The motion for mistrial was renewed and once again denied.

Petitioner argues that this series of events placed the substance of Rawls' statement before the jury in a way that "may well have been the equivalent in the jury's mind of testimony," *Douglas* v. *Alabama*, 380 U. S. 415, 419 (1965), and that, as in *Bruton* v. *United States*, 391 U. S. 123, 128 (1968), the statement "added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination . . . ." In this way, petitioner claims he was denied his constitutional right of confrontation, guaranteed by the Sixth and Fourteenth Amendments to the Constitution. See *Pointer* v. *Texas*, 380 U. S. 400 (1965). Although the judge did caution the jurors that they "must not regard any statement made by counsel in your presence during the proceedings concerning the facts of this case as evidence," petitioner contends that *Bruton* v. *United States*, *supra*, disposes of the contention that limiting instructions of this sort can be relied upon to cure the error which occurred. Although the question thus posed is not an easy one, we cannot agree with petitioner's conclusion.

First of all, it is clear that this case is quite different from either *Douglas* or *Bruton*. In *Douglas*, the prosecutor called the defendant's co-conspirator to the stand and read his alleged confession to him; the co-conspirator was required to assert his privilege against self-incrimination repeatedly as the prosecutor asked him to confirm or deny each statement. The Court found that this procedure placed powerfully incriminating evidence before the jury in a manner which effectively denied the right of cross-examination. Here, Rawls was on the stand for a very short time and only a paraphrase of the statement was placed before the jury. This was done not during the trial, while the person making the statement was on the stand, but in an opening statement. In

addition, the jury was told that the opening statement should not be considered as evidence. Certainly the impact of the procedure used here was much less damaging than was the case in *Douglas*. And unlike the situation in *Bruton*, the jury was not being asked to perform the mental gymnastics of considering an incriminating statement against only one of two defendants in a joint trial. Moreover, unlike the situation in either *Douglas* or *Bruton*, Rawls' statement was not a vitally important part of the prosecution's case.

We believe that in these circumstances the limiting instructions given were sufficient to protect petitioner's constitutional rights.* As the Court said in *Bruton*, 391 U. S., at 135, "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." See *Hopt* v. *Utah*, 120 U. S. 430, 438 (1887). It may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable. But here we have no more than an objective summary of evidence which the prosecutor reasonably expected to produce. Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given. Even if it is unreasonable to assume that a jury can disregard a co-conspirator's statement when introduced against one of two joint defendants, it does not seem at all remarkable to assume that the jury

*A more specific limiting instruction might have been desirable, but none was requested.

will ordinarily be able to limit its consideration to the evidence introduced during the trial. At least where the anticipated, and unproduced, evidence is not touted to the jury as a crucial part of the prosecution's case, "it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239 (1940).

The Court of Appeals seemed to feel that this aspect of the case turned on whether or not the prosecutor acted "in a good faith expectation that Rawls would testify." 388 F. 2d, at 780–781. While we do not believe that the prosecutor's good faith, or lack of it, is controlling in determining whether a defendant has been deprived of the right of confrontation guaranteed by the Sixth and Fourteenth Amendments, we agree with the Court of Appeals' factual determination in this case. The evidence presented in the record is sufficient to support the Oregon Supreme Court's conclusion that "the state could reasonably expect [Rawls] to testify in line with his previous statements." 245 Ore., at 9, 418 P. 2d, at 843. Accordingly, there is no need to decide whether the type of prosecutorial misconduct alleged to have occurred would have been sufficient to constitute reversible constitutional error. Cf. *Miller* v. *Pate*, 386 U. S. 1 (1967). Therefore, because we find neither prosecutorial misconduct nor a deprivation of the right of confrontation, we agree with the Court of Appeals that nothing which occurred during the prosecution's opening statement would warrant federal habeas relief.

II.

Petitioner's second argument concerns the admission into evidence of his own confession. The circumstances under which the confession was obtained can be sum-

marized briefly. Petitioner was arrested about 4:15 p. m. on September 24, 1964. He was taken to headquarters where questioning began at about 5 p. m. The interrogation, which was tape recorded, ended slightly more than an hour later, and by 6:45 p. m. petitioner had signed a written version of his confession.

After the questioning had begun and after a few routine facts were ascertained, petitioner was questioned briefly about the location of his Marine uniform. He was next asked where he was on the night in question. Although he admitted that he was with his cousin Rawls, he denied being with any third person. Then petitioner was given a somewhat abbreviated description of his constitutional rights. He was told that he could have an attorney if he wanted one and that anything he said could be used against him at trial. Questioning thereafter became somewhat more vigorous, but petitioner continued to deny being with anyone but Rawls. At this point, the officer questioning petitioner told him, falsely, that Rawls had been brought in and that he had confessed. Petitioner still was reluctant to talk, but after the officer sympathetically suggested that the victim had started a fight by making homosexual advances, petitioner began to spill out his story. Shortly after he began he again showed signs of reluctance and said, "I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now." The officer replied simply, "You can't be in any more trouble than you are in now," and the questioning session proceeded. A full confession was obtained and, after further warnings, a written version was signed.

Since petitioner was tried after this Court's decision in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), but before the decision in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), only the rule of the former case is directly applicable. *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). Petitioner

argues that his statement about getting a lawyer was sufficient to bring *Escobedo* into play and that the police should immediately have stopped the questioning and obtained counsel for him. We might agree were *Miranda* applicable to this case, for in *Miranda* this Court held that "[i]f . . . [a suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U. S., at 444–445. But *Miranda* does not apply to this case. This Court in *Johnson* v. *New Jersey* pointedly rejected the contention that the specific commands of *Miranda* should apply to all post-*Escobedo* cases. The Court recognized "[t]he disagreements among other courts concerning the implications of *Escobedo*," *Johnson* v. *New Jersey*, *supra*, 384 U. S., at 734–735, and concluded that the States, although free to apply *Miranda* to post-*Escobedo* cases, *id.*, at 733, were not required to do so. The Oregon Supreme Court, in affirming petitioner's conviction, concluded that the confession was properly introduced into evidence. Under *Johnson*, we would be free to disagree with this conclusion only if we felt compelled to do so by the specific holding of *Escobedo*.

We do not believe that *Escobedo* covers this case. Petitioner's statement about seeing an attorney was neither as clear nor as unambiguous as the request Escobedo made. The police in *Escobedo* were unmistakably informed of their suspect's wishes; in fact Escobedo's attorney was present and repeatedly requested permission to see his client. Here, on the other hand, it is possible that the questioning officer took petitioner's remark not as a request that the interrogation cease but merely as a passing comment. Petitioner did not pursue the matter, but continued answering questions. In this context, we cannot find the denial of the right to counsel which was found so crucial in *Escobedo*.

Petitioner also presses the alternative argument that his confession was involuntary and that it should have been excluded for that reason. The trial judge, after an evidentiary hearing during which the tape recording was played, could not agree with this contention, and our reading of the record does not lead us to a contrary conclusion. Before petitioner made any incriminating statements, he received partial warnings of his constitutional rights; this is, of course, a circumstance quite relevant to a finding of voluntariness. *Davis* v. *North Carolina*, 384 U. S. 737, 740–741 (1966). The questioning was of short duration, and petitioner was a mature individual of normal intelligence. The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible. These cases must be decided by viewing the "totality of the circumstances," see *e. g.*, *Clewis* v. *Texas*, 386 U. S. 707 (1967), and on the facts of this case we can find no error in the admission of petitioner's confession.

III.

Petitioner's final contention can be dismissed rather quickly. He argues that the trial judge erred in permitting some clothing seized from petitioner's duffel bag to be introduced into evidence. This duffel bag was being used jointly by petitioner and his cousin Rawls and it had been left in Rawls' home. The police, while arresting Rawls, asked him if they could have his clothing. They were directed to the duffel bag and both Rawls and his mother consented to its search. During this search, the officers came upon petitioner's clothing and it was seized as well. Since Rawls was a joint user of the bag, he clearly had authority to consent to its search. The officers therefore found evidence against petitioner while in the course of an otherwise lawful search. Under

this Court's past decisions, they were clearly permitted to seize it. *Harris* v. *United States*, 390 U. S. 234 (1968); *Warden* v. *Hayden*, 387 U. S. 294 (1967). Petitioner argues that Rawls only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphysical subtleties in judging the efficacy of Rawls' consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside. We find no valid search and seizure claim in this case.

Because we find none of petitioner's contentions meritorious, we affirm the judgment of the Court of Appeals.

Affirmed.

MR. CHIEF JUSTICE WARREN and MR. JUSTICE DOUGLAS concur in the result.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.